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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

REGENTS OF UNIVERSITY OF CALIFORNIA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 17-05211 WHA
)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, <i>et al.</i> ,)	
)	
Defendants.)	
)	
STATE OF CALIFORNIA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 17-05235 WHA
)	
DEPARTMENT OF HOMELAND SECURITY, <i>et al.</i> ,)	
)	
Defendants.)	
)	
CITY OF SAN JOSE,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 17-05329 WHA
)	
DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY, <i>et al.</i> ,)	
)	
Defendants.)	
)	

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

DULCE GARCIA, *et al.*,)
)
)
 Plaintiffs,)
)
)
VS.) **NO. C 17-05380 WHA**
)
)

UNITED STATES OF AMERICA, *et*)
al.,)
)
)
 Defendants.)
)
)

COUNTY OF SANTA CLARA and)
SERVICE EMPLOYEES INTERNATIONAL)
UNION LOCAL 521,)
)
)

Plaintiffs,)
)
)
VS.) **NO. C 17-05381 WHA**
)

DONALD J. TRUMP, in his)
official capacity as President)
of the United States, *et al.*,)
)

Defendants.)
)

San Francisco, California
Wednesday, December 20, 2017

TRANSCRIPT OF PROCEEDINGS

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1 **Wednesday - December 20, 2017**

8:02 a.m.

2 **P R O C E E D I N G S**

3 **---000---**

4 **THE COURT:** Please be seated. Welcome to everyone.

5 **THE CLERK:** Calling In Re: DACA Cases, Civil Actions
6 17-5211, 17-5235, 17-5329, 17-5380, 17-5813. Counsel, please
7 state your appearances for the record.

8 **MR. DAVIDSON:** Good morning, Your Honor.

9 Jeffrey Davidson, for the Regents of the University of
10 California.

11 **THE COURT:** Welcome.

12 **MR. ZAHRADKA:** Good morning, Your Honor.

13 James Zahradka, from the California Attorney General's Office,
14 on behalf of the States of California, Maine, Maryland, and
15 Minnesota.

16 **THE COURT:** Great. Welcome to you.

17 **MS. CROWLEY:** Good morning, Your Honor.

18 Megan Crowley, for the Regents of the University of California,
19 and President Napolitano.

20 **THE COURT:** Okay.

21 **MR. BROWN:** Good morning, Your Honor. Eric Brown,
22 for the County of Santa Clara, and SEIU Local 521.

23 **THE COURT:** Thank you. Welcome.

24 **MR. DETTMER:** Good morning, Your Honor.

25 Ethan Dettmer, from Gibson Dunn, on behalf of the Garcia

1 Plaintiffs.

2 **MR. ROSENBAUM:** Good morning, Your Honor. Mark
3 Rosenbaum, from Public Counsel, on behalf of the Garcia
4 Plaintiffs.

5 **THE COURT:** Welcome to you, too.

6 **MR. DANITZ:** Good morning, Your Honor. Brian Danitz,
7 Cotchett Pitre & McCarthy, on behalf of the City of San Jose.

8 **THE COURT:** Great. Welcome to you.

9 Okay. The Government.

10 **MR. SHUMATE:** Good morning, Your Honor.

11 Brett Shumate, from the Department of Justice, on behalf of the
12 defendants.

13 **THE COURT:** Okay.

14 **MR. ROSENBERG:** Good morning, Your Honor.

15 Brad Rosenberg. I'm from the Department of Justice, on behalf
16 of the United States.

17 **THE COURT:** Thank you.

18 **MS. BAILEY:** Good morning, Your Honor. Kate Bailey,
19 also from the Department of Justice, on behalf of the
20 United States.

21 **THE COURT:** All right. Welcome to all of you.

22 We're here on a Motions to Dismiss, 12(b)(1), by the
23 Government; Motion to Dismiss, 12(b)(6), also by the
24 Government; and plaintiffs' Motion for Provisional Relief. So
25 what I think we'll do is start with the Motion to Dismiss,

1 under 12(b)(1). And the Government will go first.

2 But then before we get through, there are so many points,
3 I think after you get to -- you make your basic point on, say,
4 your first point, then whoever's going to be responding should
5 respond. So we'll kind of go back and forth on a
6 point-by-point basis, rather than wait until the bitter end, in
7 which case I might have forgotten some of the nuances. So
8 we'll do it while it's fresher in my memory.

9 So who's going to respond for the plaintiffs on the Motion
10 to Dismiss? We'll start with the "committed to agency
11 discretion by law" point. Who's going to respond on that?

12 **MR. DAVIDSON:** I'll be addressing that, Your Honor.

13 **THE COURT:** All right. So you can stand there.

14 And who's going to make that argument?

15 **MR. SHUMATE:** I will, Your Honor.

16 **THE COURT:** All right. Okay. The floor is yours.
17 Please proceed.

18 Overall, I think we'll take, I guess, an hour and a half
19 to two hours for all of the motions, but we'll have to see how
20 it goes. So let's just jump right in. And I find this to be a
21 very interesting set of briefs, and so I thank you all for the
22 good briefing.

23 All right. Please proceed.

24 **MR. SHUMATE:** Thank you, Your Honor. I'll be
25 speaking on the jurisdictional issues. Mr. Rosenberg will

1 address the other issues -- 12(b)(6) and the response to the
2 plaintiffs' motion -- just to let the Court know.

3 **THE COURT:** That's great.

4 **MR. SHUMATE:** The Court should dismiss this case
5 because the Court lacks jurisdiction to review the Government's
6 decision to end the deferred action policy known as "DACA."

7 I'd like to focus on two reasons.

8 First, Section 701(a)(2) of the APA strips the Court of
9 jurisdiction because the denial of deferred action is an
10 exercise of prosecutorial discretion that is committed by law
11 to the Executive Branch.

12 Second, Section 1252(g) of the INA strips the Court of
13 jurisdiction to review the rescission of DACA, because Congress
14 intended to prevent courts from reviewing denials of deferred
15 action.

16 The plaintiffs try to circumvent these jurisdictional bars
17 with a number of arguments, and I'd like to respond to each of
18 them.

19 Now, primarily the rescission of DACA is not reviewable
20 simply because the Acting Secretary viewed DACA as illegal.
21 The Supreme Court addressed a situation just like this in the
22 *BLE* case. It said that just because an agency gives a
23 reviewable reason for taking some act of prosecutorial
24 discretion does not make that action reviewable.

25 Here, the action that is being challenged --

1 **THE COURT:** Okay. Wait, wait.

2 What was the name of that case?

3 **MR. SHUMATE:** *BLE*. It's a Supreme Court case from
4 the 1980s, Your Honor. We cite it in our briefs.

5 **THE COURT:** Yeah. All right. So just go through the
6 fact pattern in that case for me.

7 **MR. SHUMATE:** Sure. This was a case in which the
8 agency's decision was challenged. I believe there was a waiver
9 in that case. The agency denied the request, and gave a reason
10 for that decision.

11 And the Supreme Court said just because the agency gave a
12 reviewable reason didn't make that exercise of prosecutorial
13 discretion something that the Court could review.

14 *Heckler* is also another example where.

15 **THE COURT:** Wait, wait. What's the *BLE*?

16 For a minute.

17 Which agency was it?

18 **MR. SHUMATE:** I don't remember the name of the
19 agency, Your Honor. It was a Justice Scalia opinion. I don't
20 remember the precise petition that was filed, but the principle
21 that we cite the case for is that just because an agency gives
22 a reviewable reason for taking some act or prosecutorial
23 discretion does not then transmute that action into something
24 the Court can review.

25 *Heckler* is another example where -- that was a case

1 involving the FDCA. That was a request to take enforcement
2 action against manufacturers of drugs used in capital
3 punishment.

4 And the Secretary in that case -- of the FDA -- decided:
5 We're not going to take that action. And one of the bases for
6 that decision was there was concern about the agency's legal
7 authority to take that action.

8 In this case --

9 **THE COURT:** I thought that was the *Casey* decision.

10 **MR. SHUMATE:** No. The *Heckler versus Chaney*.

11 **THE COURT:** Oh, that's right. The *Chaney* decision.
12 Yes. Right.

13 **MR. SHUMATE:** So in this case, it's important not to
14 confuse the action that's being challenged with the decision
15 given for that action.

16 So the decision being challenged is a denial of deferred
17 action.

18 The reason given for that action -- the reasons were based
19 on litigation risk, and concerns about the legality of the DACA
20 policy.

21 So they need to point to some standard in the INA that
22 would give the Court some meaningful basis to evaluate the
23 denial of deferred action. Just because the Secretary gave a
24 reviewable reason, which is *DACA might be illegal*, is not a
25 basis to determine the denial of a deferred action into

1 something that the Court can and should review.

2 Imagine a situation with the --

3 **THE COURT:** Well, let me ask you this.

4 Didn't we have some cases within the last three or four
5 years in which -- I believe it was the EPA, but I could be
6 wrong. Seemed like there was an issue of whether or not EPA
7 could regulate fossil fuels; and the agency decided, no, it did
8 not have the power to do so.

9 And somebody took it to the Court and said, *Yes, you do*
10 *have the power to do it. You made a decision based on a flawed*
11 *legal premise that you don't have jurisdiction or authority to*
12 *regulate. You do have authority to regulate.* And seems like
13 they even got to the Supreme Court.

14 So that was held to be reviewable. Right?

15 **MR. SHUMATE:** That's right, Your Honor. That's the
16 *Massachusetts versus EPA* case in which the agency denied a
17 petition for rulemaking. And what the Supreme Court said in
18 that case was that those decisions are generally reviewable.

19 Now, judicial review of a denial of petition for
20 rulemaking is narrow, but it also distinguished *Heckler*, which
21 is a case involving the exercise of prosecutorial discretion.
22 Those decisions are presumptively unreviewable under the APA.
23 That's where we are.

24 It's quite clear that the denial of deferred action is an
25 exercise in prosecutorial discretion.

1 That is different from a decision to deny a petition of a
2 rulemaking based on --

3 **THE COURT:** Okay. If we were dealing with an
4 individual case --

5 Let's say that some DACA recipient you determined was
6 involved with a terrorist organization, and you wanted to end
7 the deferred -- you removed them from the United States. That
8 would be an individual decision. And that probably is
9 unreviewable under 1252(g), for example.

10 But here we're talking about a whole program, an
11 across-the-board, nationwide program where people get to sign
12 up. And so it's a program level, as opposed to an individual
13 level. So how do you deal with that distinction?

14 **MR. SHUMATE:** Sure. I think it's a distinction
15 without a difference, Your Honor.

16 I would first point the Court to *Heckler*. *Heckler*,
17 itself, involved a request to take an enforcement action
18 involving drugs used in capital punishment. And the request
19 was to the effect that all manufacturers of drugs used for that
20 practice, as well as a number of states.

21 So -- but I think it's important to remember: What is the
22 ultimate question?

23 The ultimate question under Section 701(a)(2) is whether
24 this action is committed to the agency's discretion by law.

25 And what the courts have said is that we have to find a

1 meaningful standard in the substantive statute to evaluate
2 whether this decision was reasonable or not, or some basis to
3 judge the agency's --

4 **THE COURT:** But if the rationale was that the agency
5 didn't have -- in our case, did not have the authority --
6 because of a Fifth Circuit decision did not have the authority
7 to do DACA, that's a quintessential legal issue; isn't it?

8 **MR. SHUMATE:** Well, it is a legal issue; but that,
9 again, confuses the reason given for the decision with the
10 action taken. And it comes back to my point about *BLE*.

11 Just because she gave a reviewable reason -- and certainly
12 courts are competent to evaluate the legal questions, but that
13 does not mean that the denial of deferred action, which is
14 inherently an exercise of prosecutorial discretion, thus
15 becomes something the Court can review.

16 Now, just imagine a different scenario. Imagine the
17 Acting Secretary had just issued a one-sentence memorandum
18 saying, "I hereby rescind the 2012 memorandum." There would be
19 no discussion of the legal basis. There would be nothing for
20 the Court to review. It shouldn't change the result, just
21 because she gave a five-page explanation of the basis for her
22 decision.

23 We think we're in the wheelhouse of *BLE*. We're not like
24 in *Massachusetts v. EPA* case, where the agency denied a
25 petition for rulemaking, because it didn't think it had

1 jurisdiction to even address the questions.

2 We're more like *BLE*, where the agency denied -- refuses to
3 take some act of prosecutorial discretion based on her own
4 reasons, but it doesn't matter what those reasons are. She
5 could have rescinded the drug policy for any reason, or no
6 reason, at all. *Just because she gave a reason doesn't make it*
7 *something that is reviewable.*

8 And if I could point the Court to two Ninth Circuit cases
9 which we think the Court should take a look at --

10 **THE COURT:** All right.

11 **MR. DAVIDSON:** So *Moda-Luna*. This is 813 F. 2d.
12 1006. 1980.

13 **THE COURT:** Wait. Give me the name again.

14 **MR. DAVIDSON:** It's *Moda-Luna versus Fitzpatrick*,
15 813 F. 2d 1006. And that was a Ninth Circuit case from 1987.

16 And then *Romero versus Smith*, 773 F. 2d. 1021,
17 Ninth Circuit, 1985.

18 Both of these cases involved decisions by the INS to deny
19 deferred action status applications. And what the
20 Ninth Circuit said in both of these cases is that District
21 Courts lack jurisdiction to review those decisions. And the
22 Court cited Section 701(a)(2) of the APA, because this is
23 something that is committed to the agency's discretion by law.

24 And the plaintiffs have not pointed to anything in the INA
25 in this case that would give the Court a meaningful standard to

1 evaluate whether this decision was reasonable or not, so there
2 is just no standard by which the Court can evaluate whether
3 there decision is reviewable or not.

4 **THE COURT:** All right. Hold that thought, and don't
5 go away.

6 I want to hear, while it's fresh in my mind, what your
7 response is.

8 **MR. DAVIDSON:** So Judge Garaufis, in New York,
9 rejected the Government's committed-to-agency-discretion-by-law
10 point.

11 **THE COURT:** That's a District Court decision?

12 **MR. DAVIDSON:** Correct.

13 **THE COURT:** That doesn't get you very far. You've
14 got to give me Court of Appeals or Supreme Court to be
15 persuasive.

16 The Government has cited U.S. Supreme Court decisions, and
17 says that --

18 Come on. Give me something that -- I read his opinion.
19 Excellent job. Nevertheless, it's not going to get you to the
20 finish line. So you need to give me Supreme Court and/or
21 Ninth Circuit.

22 **MR. DAVIDSON:** He had good reason for the decision,
23 which is -- he started that there is presumption of
24 reviewability under the APA that the Government bears a heavy
25 burden to overcome. Now, that comes straight out of the APA,

1 because the APA says that the reviewing court shall hold
2 unlawful and set aside an agency action found to be arbitrary,
3 capricious, an abuse of discretion, or otherwise not in
4 accordance with the law. The Supreme Court in *Overton Park*
5 said that the 701(a)(2) committed-to-agency-by-law exception is
6 a rare and narrow exception. So that's the basic framework, is
7 that it should be very rare when a case is dismissed under
8 701(a)(2).

9 The basic question is whether there is law to apply to the
10 Court's decision, or whether it's merely reviewing a
11 standardless exercise of discretion. I'd like to point the
12 Court to a DC Circuit case called *Robbins versus Reagan*, which
13 isn't binding on this Court, but has a very intelligent
14 discussion of the jurisdictional issue.

15 **THE COURT:** What's the name of the case?

16 **MR. DAVIDSON:** It's called *Robbins versus Reagan*.
17 And what it focuses on -- in that case, it involved the
18 government of the District of Columbia closing a homeless
19 shelter, which is a discretionary determination.

20 Nonetheless, because the agency was reversing a prior
21 policy, which was to renovate that homeless shelter, *Robbins*
22 *versus Reagan* said that when you're reversing a prior policy,
23 there's obviously law to apply, because you can look at the
24 prior policy and the rationale for it. And that would be the
25 case, even in the absence of specific statutory guidelines

1 regulating the Government's use of discretion.

2 Additionally, there's law to apply, because the *State Farm*
3 case -- U.S. Supreme Court case -- found that even when there's
4 not a specific statutory set of factors that the agency needs
5 to look at, the Court can assess whether the agency is
6 undertaking a rational rulemaking process, and considering all
7 of the relevant factors.

8 Now let me address the Government's cases.

9 The *BLE* case involved the Interstate Commerce Commission,
10 which denied a Motion for Reconsideration of an earlier
11 decision that it had made; so denial of a Motion for
12 Reconsideration. And the Court found that that kind of act was
13 quintessentially discretionary. And the fact that the agency
14 may have relied on a legal rationale for that didn't convert it
15 into a nondiscretionary decision.

16 But this is completely different. It's completely
17 different, because the agency here made a programmatic
18 decision. It abolished the DACA program in its entirety. It
19 wasn't a use of discretion; it was an abdication of discretion.
20 It was saying, *We're no longer going to exercise discretion*, so
21 it doesn't resemble the *BLE* case.

22 Nor does the situation resemble the *Heckler versus Chaney*
23 case. *Heckler versus Chaney* stands for the proposition that
24 when an agency chooses not to take an individual enforcement
25 action, that's not reviewable, because it's a standardless

1 exercise of discretion. There are lots of reasons why an
2 agency might not take a particular enforcement action.

3 But the Government has cited no cases in its brief
4 suggesting that a programmatic determination -- a decision to
5 abolish a program in its entirety -- can become nonjusticiable
6 under a *Heckler versus Chaney* kind of analysis.

7 And I heard the Government mention the *Mada-Luna*
8 Ninth Circuit case just now. That case does not apply
9 Section 701(a)(2) of the APA, at all. That's a case about
10 whether notice-and-comment rulemaking was required in the case
11 of an individual enforcement action. So it's just not a
12 701(a)(2) case, at all.

13 **THE COURT:** All right. What about the *Romero* case?

14 **MR. DAVIDSON:** I think that's similar, Your Honor.

15 **THE COURT:** Okay. Just a second. It's not a 701?

16 **MR. DAVIDSON:** The *Mada-Luna* case certainly is not.

17 **THE COURT:** Okay. Let me ask Mr. Shumate. Is that
18 correct?

19 **MR. SHUMATE:** That is not correct, Your Honor. I
20 would point to the Court to page 1,011 of the *Mada-Luna* case.
21 I can read it to the Court. In *Romero*, quote, *Where we held*
22 *that courts have no authority to review denial of deferred*
23 *action status petitions under the 1981 version of the*
24 *instruction, citing Romero, and then, See also 5 USC*
25 *Section 701(a)(2), quote, Limiting judicial review. Agency*

1 actions where they have been, quote, committed to agency
2 discretion by law provision -- to apply in Romero.

3 The other reference to *Mada-Luna* was that *Heckler* is
4 different. That was an agency decision not to enforce.
5 Different actions' decisions are different.

6 Well, footnote 4 of *Mada-Luna* rejects that argument. It
7 quotes from *Heckler*. And then it says, quote, *Thus, the same*
8 *reasoning that supported the Supreme Court's decision in Chaney*
9 *would also support the Romero decision that denials of deferred*
10 *action status applications are not subject to judicial review,*
11 end quote.

12 **THE COURT:** All right. What do you say to that?

13 **MR. DAVIDSON:** That's a see-also cite, Your Honor,
14 just as --

15 If you read *Mada-Luna* -- and I don't know if it's amenable
16 to do it while standing here -- what the Court is considering
17 is whether that individual enforcement decision required
18 notice-and-comment rulemaking; whether it was a change to
19 agency guidelines.

20 So the Court didn't deny jurisdiction --

21 **THE COURT:** Yeah, but there was something about 701.
22 You said 701 wasn't involved. It turns out that they mention
23 701.

24 **MR. DAVIDSON:** They do mention 701, Your Honor,
25 but --

1 **THE COURT:** That's not what you said. You said it
2 was irrelevant.

3 **MR. DAVIDSON:** It is irrelevant, Your Honor, because
4 the Court didn't decline jurisdiction in that case. It
5 reviewed whether -- under the APA, whether the procedural
6 requirements of the APA had been satisfied.

7 So it doesn't rely on 701(a)(2). It doesn't stand for the
8 proposition that 701(a)(2) bars review.

9 **THE COURT:** Okay. All right. The Government, a
10 minute ago, made an argument that you did not answer, so I want
11 to give you a chance to answer it. And it goes kind of like
12 this; that if the decision maker here had simply said, *We're*
13 *going to abolish DACA. Period. Right?*

14 In other words, there was an election. New people come
15 in. Old people go out. The new people want to have a
16 different policy. And they are going to have a different way
17 to administer deferred action. And so they're going to go back
18 to the drawing boards. And all programmatic DACA ended, as a
19 program; just ended. No reason given.

20 I've got two parts to the question.

21 Isn't it true that in our country, in a democracy,
22 elections have consequences? And if the side that wins wants
23 to do away with the old policy, that's their prerogative.
24 That's what elections are for.

25 And, secondly, what do you say about the specific example

1 that counsel gave; that the Secretary could have just said, *End*
2 *of program*. No reason given, at all.

3 Okay. What do you say to that?

4 **MR. DAVIDSON:** The APA says that the agency needs to
5 undertake rational decision making justified by neutral
6 principles. So the mere change of an administration absolutely
7 is not sufficient basis for an agency to change the prior
8 policy.

9 **THE COURT:** All right. So give me that citation.

10 **MR. DAVIDSON:** So *Encino Motorcars* is the
11 Supreme Court case that I would cite.

12 **THE COURT:** Wait, wait. Give me the name again.

13 **MR. DAVIDSON:** It's called *Encino Motorcars*.

14 **THE COURT:** *Encino*. All right.

15 **MR. DAVIDSON:** And it is 136 Supreme Court 2117.
16 That's a 20 --

17 **THE COURT:** Supreme Court 117 [sic]. Okay.

18 **MR. DAVIDSON:** Sorry. 2117, Your Honor.

19 **THE COURT:** 2117. All right.

20 So give me the fact pattern in the *Encino* case.

21 **MR. DAVIDSON:** So that case involves the application
22 of federal wage-and-hour laws to certain car-dealership
23 employees. And under a prior administration, there had been an
24 interpretation of that law which said that certain employees
25 were exempt from the wage-and-hour requirements.

1 Change in administration. The agency changed its
2 interpretation of the law, and said, *No. Those employees are*
3 *back within the protection of the wage-and-hour laws.*

4 And the Supreme Court -- Justice Kennedy, writing for the
5 Court, said, *That's not good enough. You just can't change on*
6 *a dime, just because there's been a change in administration,*
7 *without giving reasons for it.*

8 The prior policy created powerful reliance interests in
9 that case, because the car dealerships had structured their
10 affairs based on the earlier interpretation. And you can't
11 just pivot on a dime.

12 **THE COURT:** Do you happen to have a copies of that
13 decision here?

14 **MR. DAVIDSON:** I bet we do, Your Honor; but it may
15 take a while to gather.

16 **THE COURT:** All right. If one of your team has that,
17 I'd like to have that up here. All right. So here. Looks
18 like somebody has found it pronto. Very good.

19 (Whereupon a document was tendered to the Court.)

20 **THE COURT:** Okay. *Encino Motors.* 2016.

21 All right. So roughly where would I find that language
22 about the turning on a dime? Where would I find it?

23 **MR. DAVIDSON:** "Turning on a dime" was my gloss on
24 it, Your Honor.

25 **THE COURT:** Well, what is the closest that comes to

1 "turning on a dime"?

2 **MR. DAVIDSON:** I would direct the Court to page
3 2,126.

4 **THE COURT:** Ah, these pages are not numbered in that
5 way. So I see -- how about Roman Numeral IIA? Is that
6 anywhere near?

7 **MR. DAVIDSON:** Yep. You're in the neighborhood. So
8 I would go to the end of IIA, right before IIB.

9 **THE COURT:** Okay. All right. So here's a paragraph.

10 **MR. DAVIDSON:** First full paragraph before B starts
11 with --

12 **THE COURT:** "Agencies are free." Is that it?

13 **MR. DAVIDSON:** Yes.

14 **THE COURT:** (Reading.) *Agencies are free to change*
15 *their existing policies, as long as they provide a reasoned*
16 *explanation for the change. When an agency changes its*
17 *existing position, it need not always provide a more detailed*
18 *justification than what would suffice for a new policy created*
19 *on a blank slate, but the agency must at least display*
20 *awareness that it is changing position, and show that there are*
21 *good reasons for the new policy.*

22 *In explaining this changed position, an agency must also*
23 *be cognizant that longstanding policies may have engendered*
24 *serious reliance interests that must be taken into account. In*
25 *such cases, it is not that further justification is demanded by*

1 *the mere fact of policy change, but that a reasoned explanation*
2 *is needed for disregarding facts and circumstances that*
3 *underlay or were engendered by the prior policy. It follows*
4 *that an unexplained inconsistency in agency policy is a reason*
5 *for holding an interpretation to be an arbitrary and capricious*
6 *change from agency practice. An arbitrary and capricious*
7 *regulation of this sort is, itself, unlawful and receives no*
8 *Chevron deference.*

9 And Part B says, *Applying these principles here, the*
10 *unavoidable conclusion is that the 2011 regulation was issued*
11 *without the reasoned explanation that was required, in light of*
12 *the Department's change in position and a significant reliance*
13 *interest involved.*

14 In promulgating the 2011 regulation, the Department
15 offered barely any explanation. A summary discussion may
16 suffice in other circumstances; but here, in particular,
17 because of decades of industry reliance on the Department's
18 prior policy, the explanation fell short of the agency's duty
19 to explain why it deemed it necessary to overrule its previous
20 position.

21 All right. Enough of -- I kind of got the idea.

22 All right. You raise a good point. So let's hear what
23 the Government has to say in response to this decision.

24 **MR. SHUMATE:** Your Honor, it's quite noteworthy that
25 the only law to apply that they can point to is the arbitrary

1 and capricious standard of the APA. Under Section 706, of
2 course, as the Court knows, the Court can set aside agency
3 actions that are arbitrary and capricious, contrary to law.

4 Section 701(a)(2) of the APA is an exception to that
5 standard that courts are to apply when there are agency actions
6 that are committed to the agency's discretion.

7 What they're trying to do is gut that entire exemption, by
8 applying the APA standard of review. If that is the law to
9 apply, then Section 701(a)(2) is meaningless, because the Court
10 can always look to the APA.

11 **THE COURT:** Well, fine. Is that fair? I thought
12 that the law that they were trying to apply is to say that the
13 agency, in fact, did have the authority to have a programmatic
14 grant of deferred action, and go through all of the history of
15 the INA, and the Supreme Court's giving its blessing to
16 deferred action, and so forth. Even Congress has recognized
17 it. So I don't think that's fair to say that their argument is
18 the arbitrary and capricious.

19 I think their argument is that there is a body of law to
20 look and see whether or not the Attorney General was correct
21 when he said that the Fifth Circuit was correct, and that the
22 Fifth Circuit would apply DAPA to DACA, and fold their tent,
23 and leave.

24 So, I mean, any judge could make that kind of a decision.
25 That's definitely something that judges decide all of the time.

1 So I think that's the law that they're trying to apply.
2 Right?

3 **MR. SHUMATE:** I don't think so, Your Honor. The way
4 I read all of their arguments in the Motion for Provisional
5 Relief was that this was an arbitrary and capricious decision,
6 because the agency didn't consider this factor, and that
7 factor, and reliance interests, and, you know, other
8 arbitrary-and-capricious-type arguments; but let me point the
9 Court to --

10 **THE COURT:** No, but the Supreme Court, itself, has
11 said in this very decision that reliance interests should be
12 taken into account when you're reversing a policy.

13 **MR. SHUMATE:** Well, if the APA supplies the law here,
14 then, of course, those arguments would have -- that standard
15 would apply.

16 But what *Heckler* said is that in a case involving
17 enforcement discretion, there's a presumption against
18 reviewability. And to rebut that presumption, paragraph --
19 page 833 of *Heckler* says, The presumption -- well, *The*
20 *presumption may be rebutted, where a substantive statute has*
21 *provided guidelines for the agency to follow in exercising its*
22 *enforcement powers,* end quote.

23 So there is nothing that they can point to in the INA; no
24 particular statute, no regulation adopted by DHS for grants or
25 denials of deferred action. That is the substantive standard

1 that they need to come forward with to rebut the presumption
2 that agency --

3 **THE COURT:** Wait. You say that the presumption is
4 against reviewability, but *Bowlby* and a second decision by the
5 Supreme Court that I'm blanking on say that there is a
6 presumption in favor of reviewability, and that the committed
7 of agency exception; the "rare exception" is the phrase.

8 So these are two different presumptions. You're talking
9 about -- where did you get your language about presumption?
10 Where did that come from?

11 **MR. SHUMATE:** Heckler and AADC establish it.

12 **THE COURT:** All right. Hand me up that decision, so
13 I can look at that language.

14 **MR. SHUMATE:** The highlighted pink.

15 (Whereupon a document was tendered to the Court.)

16 **THE COURT:** All right. So I'll ignore all of your
17 underlines.

18 Sometimes they hand these up to me. It says, "Oh, this is
19 bad."

20 (Laughter in the courtroom.)

21 **MR. SHUMATE:** It all good for us, Your Honor. The
22 highlighted pink language is what I'm referring to.

23 **THE COURT:** I won't look at all of those notes.
24 Okay.

25 **MR. SHUMATE:** So it talks about a presumption. So

1 does the AADC.

2 **THE COURT:** (Reading.) *In so stating, we emphasize*
3 *that the decision is only presumptively unreviewable. A*
4 *presumption may be rebutted where the substantive statute has*
5 *provided guidelines for the agency to follow in exercising its*
6 *enforcement powers.*

7 Let me -- it does say what you said, but I've got to get
8 the context here. All right. Let's look at the whole
9 paragraph. This is in *Chaney* now.

10 **MR. DAVIDSON:** I don't have access to Counsel's
11 highlighting, so if I could get a page cite, that would be
12 helpful.

13 Here. Well, looks like 833. Okay?

14 **THE COURT:** (Reading.) *We, of course, only list the*
15 *above concerns to facilitate understanding of our conclusion*
16 *that an agency decision not to take enforcement action should*
17 *be presumed immune from judicial review under 701(a)(2) for*
18 *good reason. Such a decision has traditionally been committed*
19 *to agency discretion; and we believe that the Congress, in*
20 *enacting the APA, did not intend to alter that tradition. In*
21 *so stating, we emphasize that the decision only*
22 *presumptively --*

23 No. Okay.

24 *-- is only presumptively unreviewable.*

25 All right. So what they're talking about here in this

1 paragraph, as I read the whole paragraph, is an agency decision
2 not to take enforcement action.

3 So the other side is going to say, *Well, that doesn't*
4 *apply here, because we have a program -- and a nationwide*
5 *program -- under which people are getting work permits. And*
6 *therefore, that is different from an agency decision not to*
7 *take enforcement action.*

8 **MR. SHUMATE:** So *Mada-Luna* spoke to that. That's the
9 portion I read from the footnote, which -- this, again -- this
10 is the denial of the deferred status application.

11 **THE COURT:** Hand that back (indicating).

12 **MR. SHUMATE:** Footnote 4 talks about *Heckler*, and
13 then says that same reasoning in *Heckler* -- again, a decision
14 not to enforce -- applies foursquare in a decision to deny
15 deferred action. And that is this case.

16 So just because this is a decision to deny deferred action
17 is not a meaningful distinction. And it's also not a
18 meaningful distinction that this is a class-based decision
19 rather than an individualized decision.

20 **THE COURT:** All right. Hold that thought.

21 What do you say? You still haven't answered that
22 question. Why isn't this a decision to deny deferred action
23 across the board? Why doesn't that fall within a decision not
24 to prosecute; not to regulate?

25 **MR. DAVIDSON:** There is a critical distinction

1 between individual enforcement decisions, and programmatic
2 decisions. The Government has not cited any case saying that a
3 programmatic decision -- a decision to deny a benefit to people
4 across the board -- is unreviewable under the APA.

5 *Heckler versus Chaney* involved an individual enforcement
6 decision.

7 *Mada-Luna*, while it doesn't apply --

8 **THE COURT:** No. Wait, wait, wait. *Chaney* was a
9 petition by condemned inmates who wanted the FDA to regulate
10 the drugs used in executions. Right?

11 **MR. DAVIDSON:** They wanted -- they wanted --

12 **THE COURT:** So that would have been across the board.
13 That would have been a programmatic regulation, not just for
14 one execution. Right.

15 **MR. DAVIDSON:** They wanted the FDA to undertake
16 enforcement actions against particular drug makers. It wasn't
17 programmatic in that way.

18 It did involve multiple drug makers, to be sure.

19 But I think it's worthwhile to look -- to back up a little
20 bit about what's animating *Heckler versus Chaney*. The question
21 here is: Is there a role for the courts to play, or have they
22 been stripped of jurisdiction because there's nothing they can
23 do to apply the APA?

24 And so *Heckler versus Chaney* stands for the proposition
25 that if you're talking about a one-off or two-off or three-off

1 enforcement decision, there are so many reasons that the
2 Government could make that decision, that there's really
3 nothing for the Court to do.

4 But where a decision is programmatic, and especially where
5 the decision is reversing prior policy, there obviously is
6 something for the Court to do. You can look at the concerns
7 that underlay the prior policy. You can look at the legal
8 rationale for what the Government is doing. In this case, you
9 can look at the OLC memo, which Judge Garaufis found to be a
10 source of law that you could apply.

11 And so the fundamental question is really whether there's
12 something for the Court to do. And it's a rare circumstance
13 where you would cut the courts completely out of reviewing
14 agency action, which is why it's such a rare bird.

15 **THE COURT:** What, in your view --

16 If the Government wanted to change the policy, and just
17 eliminate DACA, I assume that you would agree there ought to be
18 some way that the agency could do that?

19 **MR. DAVIDSON:** Yes.

20 **THE COURT:** Is that true? I mean, do you at least
21 agree with that?

22 **MR. DAVIDSON:** If they go through notice-and-comment
23 rulemaking like they're supposed to, and if they give reasons
24 for it, and if they consider the reliance interests of the
25 prior policy, and they make a nonarbitrary, noncapricious

1 decision, then they're entitled to do it; but they have to jump
2 through those hoops. They have to satisfy the requirements of
3 the APA.

4 **THE COURT:** All right. So okay. We'll come to the
5 notice-and-comment thing later, but -- still, help me
6 understand this.

7 The agency says, *We don't want to do across-the-board*
8 *deferrals anymore. We're going to do them the way they were*
9 *done before DACA.*

10 So isn't that a decision --

11 It does seem like that has some elements of prosecutorial
12 discretion.

13 And is that -- usually, prosecutorial discretion is not
14 reviewable.

15 So they're doing it on a programmatic basis. That's true.

16 But where is the decision that you have that says they
17 can't do it on a programmatic basis?

18 **MR. DAVIDSON:** Well, the mere fact that they're
19 exercising discretion -- and I think this is an important
20 point -- doesn't mean that it becomes unreviewable. In fact,
21 the APA explicitly says that you do need to review agency
22 action to see if it's an abuse of discretion. So there's a
23 premise that the agency will be exercising discretion; but
24 nonetheless, it's reviewable.

25 **THE COURT:** So wait. What -- I thought the --

1 Is that right? If the agency decided that they were going
2 to remove somebody from the country who was previously a DACA
3 recipient, is that reviewable for abuse of discretion?

4 **MR. DAVIDSON:** That's a harder case, Your Honor, but
5 it may be reviewable. There is one. There's a District Court
6 that did review a decision like that. I would point the Court
7 to the *Inland Empire* case, 2017 Westlaw 5900061. So that's a
8 Court that found that the *Heckler* presumption that individual
9 enforcement actions are not reviewable was overcome, and that
10 there were sources of law to apply based on the parameters of
11 the DACA program. So I think that's a harder case.

12 But in a case where a program is being abolished -- that's
13 a classic case that should be judicially reviewable.

14 And I would again direct the Court's attention to the
15 *Robbins versus Reagan* case from the D.C. Circuit, which stands
16 for the proposition that even when you've got a very
17 discretionary type of decision -- there, the allocation of
18 funds to renovate homeless shelters -- if you're reversing a
19 prior policy in its entirety, there is law to apply. And 702
20 (a) (1) doesn't --

21 **THE COURT:** Well, what if the United States Attorneys
22 Office here in our District, or the Justice Department, decided
23 that even though marijuana was a federal-law violation 24/7 --
24 every day of the week, every hour of the week it violates
25 federal law to have marijuana -- but nevertheless that on a

1 program level, they were not going to prosecute those cases.

2 Would that -- because it's a program, would that decision
3 be reviewable?

4 **MR. DAVIDSON:** It would depend on how the program is
5 articulated. It's case by case. So if they --

6 **THE COURT:** It's not even articulated. They just do
7 it. They send out a memo saying, *We're not going to enforce*
8 *the marijuana laws anymore.*

9 And then the new Administration comes in and says, *We are*
10 *going to enforce the marijuana laws now.*

11 I tell you. I think that happens all of the time. And
12 nobody ever challenges that as violating the APA.

13 **MR. DAVIDSON:** Well, I would say that memo gets
14 pretty close to the *Massachusetts versus EPA* case, where the
15 EPA says, you know, *We're not going to regulate greenhouse*
16 *gasses.*

17 **THE COURT:** No. They did that because they thought
18 they couldn't.

19 This is different. And the example I gave is where they
20 just say, as a matter of priorities, we either are or we aren't
21 going to --

22 You know, it's the same thing with child pornography.
23 Every time there's a new Administration, they come up with
24 their own priorities of what they want to prosecute.

25 White-collar crime. Maybe somebody else won't prosecute

1 white-collar crime.

2 So usually, though, that's not -- I don't think anybody
3 would think those are reviewable by a judge.

4 **MR. DAVIDSON:** So generally -- I think generally,
5 those types of statements are issued as non-binding policy
6 statements, where they say here. *You know, here's our priority*
7 *and our general practice, which we may depart from in any*
8 *particular case.* So there's a difference between abolishing a
9 program in its entirety, and setting forward a new guideline.

10 The rescission of DACA is a highly mandatory type of act.
11 If a DACA application came in on September 6th, it was
12 mandatory that it be denied. If a renewal application came in
13 on October 6th, it was mandatory that it be denied.

14 If a DACA applicant wanted to leave the country and return
15 for advanced parole, the rescission memorandum says you need to
16 deny all of those applications, and return the fees.

17 So this is a mandatory type of program. It's not a
18 general statement of policy that can be deviated from in any
19 particular case.

20 And I think it's important to look at the Government's
21 briefs. They do not cite a case that found that a programmatic
22 type of decision like this is unreviewable under Section
23 702(a)(1). It may not need notice and comment. There are a
24 variety of exceptions to notice and comment, but that doesn't
25 mean that the courts have nothing to do, and should deny

1 jurisdiction.

2 **THE COURT:** Okay. The Government gets to have the
3 last word on this, and then I think we'll move to another
4 issue.

5 **MR. SHUMATE:** Thank you, Your Honor.

6 I think your hypothetical is a good one. Imagine the U.S.
7 Attorney out here issues a policy statement saying, *We're no*
8 *going longer going to charge drug crimes.* And then four years
9 later, they withdraw that policy and say, *We are going to*
10 *charge drug crimes here in this District.*

11 That's no different than what is going on here. First you
12 have the 2012 memo saying, *We're going to grant deferred action*
13 *status.* In other words, we're going to grant reprieves or
14 stays of deportation. And then four or five years later the
15 new Secretary says, *We're going to rescind that memorandum, and*
16 *we're not going to grant deferred action status anymore.*

17 It's very, very similar to that.

18 **THE COURT:** There is one difference; and that is
19 under my example, the marijuana growers are not signing up, and
20 paying money, and revealing lots of personal identifying
21 information, and living within the limits of the program.

22 Whereas under DACA, they did sign up; they did pay money;
23 they did give information. And the record seems to indicate
24 that they complied; that there's been -- like, 71 percent of
25 the DACA recipients are employed in the economy. And, by the

1 way, they get these work authorizations so they can work, and
2 get a Social Security number, and pay taxes, and --

3 So there is a -- I don't think you can deny that there's a
4 huge programmatic component to the DACA program. It does
5 involve deferred action, but it also involves work
6 authorizations. And so lots of people have built up reliance
7 on this program. Wouldn't you at least agree with that?

8 **MR. SHUMATE:** Well, I would point the Court to the
9 last paragraph in Secretary Napolitano's memo creating the DACA
10 policy. And my colleague will, I'm sure, address this, as
11 well.

12 Again, the memorandum confers no substantive right,
13 immigration status, or pathway to citizenship. Only Congress,
14 acting through its legislative authority, can confer those
15 rights.

16 **THE COURT:** Exactly. That's true.

17 But at least it built up expectations; don't you think?

18 **MR. SHUMATE:** I think if that's true here, it would
19 be true in your hypothetical, as well.

20 If individuals are relying on it --

21 **THE COURT:** Well, what was the Supreme Court then
22 talking about in this other case where the Labor Department had
23 a policy that built up expectations? I guess they called it
24 "reliance" -- engendered serious reliance interests that must
25 be taken into account.

1 I think these people who signed up for DACA -- the same
2 thing could be said.

3 **MR. SHUMATE:** Well, they certainly -- in that case
4 weren't talking about an exercise of prosecutorial discretion.

5 And what the *BLE* case had mentioned after that principle
6 where they said, *Just because a prosecutor gives a reviewable*
7 *reason doesn't turn the action into something that can be*
8 *reviewed* -- they gave the example of a prosecutor.

9 There are a number of cases, you can just imagine, where a
10 prosecutor might say, *We're not going to prosecute this crime,*
11 *because we don't think the law will sustain a conviction.* That
12 is certainly a reviewable reason. The Court is certainly
13 competent to evaluate that legal basis.

14 So, too, here. Certainly, the Court might be competent to
15 evaluate whether DACA is lawful or not, but that does not
16 transmute this decision to denying deferred action, into
17 something the Court can and should review, because, again,
18 there is no law to apply, and it doesn't matter that there is a
19 classwide decision or individualized basis.

20 And again, they say we can't point to a case involving,
21 you know, a programmatic decision that has not been reviewable;
22 but I don't think they've pointed to a case today that did
23 involve a programmatic decision involving prosecutorial
24 decision where a court did review that decision.

25 **THE COURT:** All right. I asked that question. And I

1 think Government counsel is correct on that; that you have not
2 pointed to such a decision.

3 **MR. DAVIDSON:** We certainly say --

4 **THE COURT:** Let's make sure. You did point to a
5 District Judge, but how about appellate decisions?

6 **MR. DAVIDSON:** We certainly cited cases where
7 programmatic decisions were found to be not subject to
8 701(a)(2). I don't have at my fingerprints whether those were
9 enforcement-discretion decisions.

10 **THE COURT:** Well, it's a combination of program and
11 enforcement priorities.

12 I could give you another example, thinking about it. The
13 U.S. Attorney's Office here, in the last four years, five
14 years, greatly curtailed the 1326 cases, which -- I don't know.
15 I am not privy to what goes on in the U.S. Attorney's Office,
16 but I could just look at it, and tell you from this point of
17 view that there have been very few of them.

18 Well, that was somebody's enforcement decision. And yet
19 maybe that was an internal program. I don't know. It's
20 just -- it does involve prosecutorial discretion.

21 **MR. DAVIDSON:** Your Honor, I'm not --

22 **THE COURT:** So you don't have a case that says
23 program plus prosecutorial discretion is reviewable?

24 **MR. DAVIDSON:** I don't have one at my fingerprints,
25 Your Honor. We could track one down.

1 Let me address the hypothetical, because I think the Court
2 focused on something very important. There's a difference
3 between saying, *We're not going to prosecute marijuana crimes,*
4 versus, *We are going to legalize marijuana, and we're going to*
5 *have a marijuana-growers program where you're going to sign up*
6 *and register your marijuana-growing operation with the federal*
7 *government, and pay an application fee, and get a license, and*
8 *pay taxes, and do all of that.*

9 And then the next day the Government says, *Oh, enforcement*
10 *discretion. We're coming in, and not only are we shutting down*
11 *your business; we're going to prosecute you and throw you in*
12 *jail.*

13 I think in that sort of situation, that would not be
14 deemed an exercise of enforcement discretion.

15 **THE COURT:** Well, that could be right. I wish you
16 had a decision right on point.

17 I wish you had a decision right on point.

18 This is -- okay.

19 **MR. DAVIDSON:** I think there's a reason there are not
20 decisions right on, point which is that it is very rare for the
21 Government to articulate something and give benefits to a huge
22 class of people, and then yank the rug right out from under
23 them, without giving any reason for it. We've been fortunate
24 that the Government does not usually do that.

25 And in the cases where they do change policy -- the

1 *Encino Motorcars* case is one of them, but I would also cite the
2 Supreme Court's *State Farm* decision, and the *Fox Communications*
3 decision. In those cases the Supreme Court just said, *You need*
4 *to give a reason for why it is that you're changing course.*
5 *We're not just going to assume that you're doing it for a good*
6 *reason. We're going to exercise our judicial prerogatives to*
7 *review what's going on.*

8 It's because this policy is so unusual, I think, that
9 there's not a ton of cases addressing this exact scenario.

10 **THE COURT:** All right. Let's get a start on the
11 standing -- now, I don't think we've got time for 1252(g),
12 unless you want to add something more to that. I think that's
13 the same argument we've been going over, so close enough.

14 So let's go to the standing questions.

15 **MR. SHUMATE:** Could I say one brief thing on 1252(g),
16 Your Honor? Just two decisions I just want to make sure the
17 Court's aware of.

18 **THE COURT:** All right. Go ahead.

19 **MR. SHUMATE:** Seventh Circuit, the *Botezatu* decision.
20 And I'll just quote some language for the Court. (Reading.)
21 *Review of refusal to grant deferred action is excluded from the*
22 *jurisdiction of the District Court, end quote.* We cite that
23 case in our brief.

24 **THE COURT:** What's the name of the decision?

25 **MR. SHUMATE:** *Botezatu.* It is -- versus INS, 195 F.

1 3d. 311. Seventh Circuit 1999. I've --

2 **THE COURT:** All right.

3 **MR. SHUMATE:** And then the Third Circuit, in *Vasquez*,
4 says that courts do not have, quote, jurisdiction to review a
5 denial of DACA relief, because that decision involves the
6 exercise of a prosecutorial discretion not to grant a deferred
7 action.

8 **THE COURT:** All right. What's the cite to that?

9 **MR. ZAHRADKA:** It's not a published case, Your Honor.

10 **THE COURT:** What?

11 **MR. ZAHRADKA:** That is not a published case.

12 **MR. SHUMATE:** That's correct.

13 **THE COURT:** Well, then, what is their rule in the
14 Third Circuit? Do they have a rule like ours, or we -- we can
15 in the Ninth Circuit. I can cite to an unpublished decision.
16 Used to be you could not, but --

17 **MR. SHUMATE:** I don't know the Third Circuit rule,
18 Your Honor; but it is -- it is unpublished. It's a 639 Federal
19 Appendix 898 from 2016.

20 **MR. ZAHRADKA:** We can advise on that rule, if you'd
21 like, Your Honor.

22 **THE COURT:** Maybe. I don't know. We have so many
23 briefs already. I don't know. All right. So --

24 **MR. ZAHRADKA:** May I address the cases that counsel
25 just cited on 1252(g) issues briefly?

1 **THE COURT:** Sure.

2 **MR. ZAHRADKA:** I'll just say that Your Honor had it
3 right the first time, on October 19th, when you ruled that
4 1252(g) does not apply to this type of decision that we're
5 dealing with here. And *Botezatu* and the unpublished case are
6 both individual determinations.

7 That's really at the core of what the Triple A DC decision
8 -- the Supreme Court decision -- was discussing when it talked
9 about the purpose of 1252(g), and the very particular types of
10 decisions to which it applies.

11 And, as the Court has ruled already in this case, that
12 simply doesn't apply here. And that decision by this Court
13 should stand, unless it's a clearly erroneous or -- and would
14 manifest injustice.

15 The defendants have not made any showing of that, or even
16 argued that. So you should stick with that ruling that you
17 already made. It's narrowly construed. Plenty doesn't apply
18 here. And their interpretation is strained and inaccurate, to
19 quote your words in October.

20 **THE COURT:** All right. Now we'll go to standing.
21 Who's going to argue that for the Government?

22 **MR. SHUMATE:** I will, Your Honor.

23 Just very briefly, I don't think we need to spend too much
24 time on this, because we haven't challenged the standing of the
25 individual plaintiffs. We've challenged the standing of the

1 entity plaintiffs. We don't believe they have standing,
2 because they have a generalized grievance with this policy.
3 And they shouldn't have --

4 **THE COURT:** But if the Texans can sue in that Fifth
5 Circuit case, which -- you seem to love that decision -- why
6 can't California sue in this case?

7 **MR. SHUMATE:** Well, it's -- the allegation that Texas
8 was making in that case is very different. They were saying
9 that they were financially harmed by being compelled to grant
10 drivers' licenses to DACA recipients, and that was a financial
11 harm to the state.

12 I don't think they're alleging that type of harm here.
13 They're more challenging the incidental effects of a
14 prosecution policy.

15 **THE COURT:** Well, what many of them say is that the
16 work authorizations that are available through the DACA program
17 are important to allow University of California, for example,
18 to hire, as employees, DACA recipients. And they then become
19 fully employed, and pay taxes, and perform in a way that I wish
20 everybody -- we all wish that everyone in this country could
21 perform. They're contributing to the country.

22 But it's that employment relationship that is important.
23 They're on the employer's side, but that's important to them,
24 as the employer.

25 Why isn't that good enough?

1 **MR. SHUMATE:** Just think of the ramifications,
2 Your Honor, if an entity or a citizen could challenge the
3 prosecution of another individual.

4 We cited a case, *Linda versus Richard*, a Supreme Court
5 case from 1973. That quote says, *A private citizen lacks a*
6 *judicially cognizable interest in the prosecution or*
7 *nonprosecution of another.*

8 Now just imagine. If these entities have standing to
9 challenge the incidental effects of the enforcement of federal
10 immigration law, that would blow standing wide open.

11 It's very different than the *Texas* case, where there was
12 a -- a cognizable -- at least, the Fifth Circuit ruled there
13 was a cognizable injury to Texas, because they were financially
14 harmed by being required --

15 **THE COURT:** How about payment of taxes? Isn't that
16 enough?

17 **MR. SHUMATE:** That is quite tangential, Your Honor.

18 **THE COURT:** Why is that? I mean, it helps contribute
19 to the tax base. That's not taxpayers' standing. It's the tax
20 recipient. It's the Treasury that's harmed if DACA goes down
21 the drain. So seems like that's a legitimate concern.

22 And one where I think you may have some traction is SEIU.
23 Who's going to speak for SEIU?

24 I think SEIU may be in trouble with me here. I'd like you
25 to show me that the Constitution and/or Bylaws where it says

1 that standing up for DACA is part of the SEIU. It's easy to
2 say that in a declaration. That doesn't get you very far. But
3 it's got to be in the Bylaws or the Constitution to satisfy me.
4 I think this is pretty far-fetched, to be honest, but you get
5 your -- you know, I'll give you a chance to justify SEIU's
6 existence in this case.

7 **MR. BROWN:** Your Honor, I mean, we've alleged clearly
8 in the Complaint and put in, through the Declaration of
9 Riko Mendez, who's the Chief Elected Officer of SEIU Local 521,
10 the fact that the Union is committed to comprehensive
11 immigration reform. It's part of the Union's -- one of the
12 basic policy positions the Union has consistently taken.

13 **THE COURT:** Is it in the Constitution or the Bylaws?
14 No. No, it's not.

15 **MR. BROWN:** The Union set up a Committee on
16 Comprehensive Immigration Reform a couple of years ago, and has
17 consistently worked on this issue at both the local level --

18 **THE COURT:** Would you answer my question?

19 **MR. BROWN:** So --

20 **THE COURT:** Is it in the Bylaws or the Constitution?

21 **MR. BROWN:** Your Honor, the Mission Statement
22 incorporated in Local 521's Constitution provides that, *The*
23 *Union affirms that our Members shall be treated and accepted*
24 *equally with dignity and respect. All members are open to our*
25 *Union and encouraged to participate, and shall not be*

1 *discriminated against on the basis of a number of factors,*
2 *including immigration status.* That's in paragraph 8. That
3 excerpt from the Union's Constitution is in paragraph 8 of the
4 Mendez Declaration that's part of the Record. So, yes, it is
5 in the Union's Constitution. The Union has worked on DACA
6 specifically.

7 **THE COURT:** Where is that in your submission?

8 **MR. BROWN:** So it's Docket Entry 119. It's part of
9 the big -- a big packet of declarations that we submitted in
10 support of the Motion for Provisional Relief. And
11 specifically, the declarations are consecutively paginated; and
12 that is at page 806.

13 So not only is it part of the Union's Constitution, and
14 not only has the Union worked on this from an advocacy
15 perspective, but the Union has worked on DACA, specifically.
16 The Union organized information sessions around the state to
17 encourage individuals to apply for DACA, and assisted
18 individuals with the application process; set up a website to
19 connect DACA-eligible individuals with resources.

20 **THE COURT:** Is that in your record, too?

21 **MR. BROWN:** It is. That is also in the Mendez
22 Declaration. It's page 807 in that consecutively paginated
23 packet of declarations. That's at paragraph 11 of the Mendez
24 Declaration. So --

25 **THE COURT:** Hold that thought.

1 All right. What do you say to that? It sounds like the
2 Union has -- the Local has a committee. They go out. They try
3 to get DACA enrollees to enroll. And then if the DACA program
4 is terminated, then all of that effort will be for naught. So
5 why isn't that enough for standing?

6 **MR. SHUMATE:** It's still not enough, Your Honor,
7 because they don't have a personal stake in the outcome of the
8 controversy. They are just challenging incidental effects of
9 the enforcement of federal immigration law.

10 If these plaintiffs have standing, then any employer could
11 challenge the Government for enforcing a law against any of
12 their employees. That just -- it doesn't make sense.

13 **THE COURT:** Well, I thought they did have standing --
14 employers. Don't employers have standing, too?

15 **MR. SHUMATE:** To challenge the removal of one of
16 their employees? I don't think so, Your Honor.

17 **MR. BROWN:** And to --

18 **THE COURT:** But it's the work authorization. I mean,
19 the employer could say, *Look. This work authorization is*
20 *important. We can't employ this guy unless he's got a work*
21 *permit. And if you're going to get rid of the work-permit*
22 *program, then we can't employ him.* Seems like that ought to be
23 enough for standing for an employer.

24 **MR. SHUMATE:** Respectfully disagree, Your Honor.

25 Again, this is a decision to deny deferred action.

1 Work authorization is a collateral benefit of an
2 individual who has --

3 **THE COURT:** That's a huge benefit. It's not
4 collateral. It's -- maybe the heart of this whole program is
5 the work permit.

6 **MR. SHUMATE:** It is certainly a collateral
7 consequence. I don't deny that it may be important; but the
8 decision here was a decision to denied deferred action, which
9 essentially commences a removal proceeding.

10 So if these employers have standing to challenge the
11 removal -- the decision to remove individuals from this
12 country -- then it's hard to see why any employer wouldn't have
13 standing to challenge any enforcement of federal law against
14 any individual who they may have a connection with.

15 **THE COURT:** All right. What do you say to that?

16 **MR. BROWN:** To be clear, Your Honor, I'll let my
17 co-counsel speak to the situation of employers; but the Union
18 here is not akin to an employer. The Union is asserting
19 associational standing by which it stands in the shoes of its
20 members. And we've clearly alleged that the Union has members
21 who are DACA recipients who will personally be subject to
22 deportation, who will personally lose work-authorization
23 status. The Union is actually much more akin to the individual
24 plaintiffs in the *Garcia* case than it is the employers bringing
25 claims.

1 And we've cited a number of Supreme Court cases supporting
2 the idea of the Union's associational standing, which is very
3 distinct from the standing --

4 **THE COURT:** What do you say to association, like
5 *Sierra Club versus Morton*, and all of those cases where you
6 have an association, and the members have an interest in the
7 individual program, and therefore there's associational
8 standing?

9 **MR. SHUMATE:** Well, I don't know if they've
10 identified the specific members. Maybe they have. I just --
11 but I think an associational-standing case, to identify injury
12 to the members, you have to identify the members. And we do
13 have the Garcia Plaintiffs. I don't know if the Union has
14 identified the specific members of the Union who are DACA
15 recipients who were affected by this. I think that would be a
16 prerequisite to associational standing. They may have done
17 that. Just -- I'm not sure about that.

18 **THE COURT:** All right. We're going to take a break
19 here for about 15 to 20 minutes, and come back, and go to
20 Motion for Provisional Relief.

21 Now let me just make -- before we end, as I see this, the
22 Motion for Provisional Relief is, of course, tied indirectly to
23 what we've been talking about so far; but it is not tied into
24 the 12(b) (6), except for the APA part.

25 In other words, the, quote, "Motion for Provisional

1 Relief" is directed only to the APA. It does not cover the
2 constitutional claims. So everything that deals with 12(b) (6)
3 on Equal Protection, Due Process, Equitable Estoppel -- all of
4 that is -- you don't need to get to, for purposes of
5 provisional relief. Or do I have that right, or not? Somebody
6 want to add or subtract?

7 **MR. DAVIDSON:** Yes, Your Honor. The Motion for
8 Provisional Relief just focuses on the APA claims.

9 **THE COURT:** Is that right?

10 **MR. ROSENBERG:** That is correct. Although we would
11 take the position that the Court should resolve the 12(b) (6)
12 issues before it gets to --

13 **THE COURT:** Well, we'll just stick to the APA claims.
14 I think I have to do that.

15 **MR. ROSENBERG:** Yes.

16 **THE COURT:** Haven't we already covered that in the
17 discussion this morning? Was there more to say there?

18 **MR. ROSENBERG:** I think there may be a little more to
19 say there.

20 **THE COURT:** Maybe we will cover that more to say when
21 we come back. Okay? All right. Fifteen to twenty minutes.
22 Thank you.

23 (Recess taken from 9:04 a.m. until 9:25 a.m.)

24 **THE COURT:** Okay. Welcome back. Let's go back to
25 work. Let's on the 12(b) (6) let's address the notice and

1 comment point.

2 Let me ask first of all on the plaintiffs' side who's
3 going to address this.

4 **MR. DAVIDSON:** I will, Your Honor.

5 **THE COURT:** How can you justify saying that there
6 should have been notice and comment for the rescission, when
7 there was not notice and comment for the institution of DACA?
8 So if it's good for the goose, it's good for the gander. What
9 do you say to that point?

10 **MR. DAVIDSON:** I think it's fairly straightforward,
11 Your Honor. There's a difference between -- the cornerstone of
12 when notice and comment is required is when there's a binding
13 rule that's put in place.

14 The creation of DACA was not the creation of a binding
15 rule. It was the creation of a set of guidelines that
16 qualified applicants for an exercise of enforcement discretion.
17 In each individual case, there remained discretion with the
18 Department of Homeland Security whether or not to give someone
19 a DACA grant. So it's discretionary. And that kind of
20 nonbinding policy statement doesn't require notice and comment.

21 The rescission is quite different. It is not an exercise
22 of discretion. It's an abdication of discretion. It's a
23 destruction of discretion.

24 If the Department of Homeland Security receives that DACA
25 application on September 6th, they have to deny it.

1 **THE COURT:** Well, but they have to deny it as a DACA,
2 yes, because the DACA won't exist anymore; but on the other
3 hand, they still will be deciding, case by case, on a
4 discretionary basis whether or not to allow somebody to have
5 deferred action.

6 I don't think even the Government is saying that they're
7 going to immediately deport 600,000 people, or even one of the
8 600,000 people. I think the Government is saying they're still
9 going to exercise discretion, but they're going do it case by
10 case, like they did before DACA. So why isn't that okay?

11 **MR. DAVIDSON:** Well --

12 **THE COURT:** Why does that require notice and comment?
13 I mean --

14 **MR. DAVIDSON:** Well, let me resist the premise a
15 little bit, Your Honor. They did tell DACA recipients that
16 they should prepare for and arrange their departure from the
17 United States, and so their intentions are not totally clear.

18 **THE COURT:** When did they say that?

19 **MR. DAVIDSON:** Let me get the cite. It was in the
20 Talking Points that were circulated in connection with the DACA
21 program. It's in the neighborhood of 2,200 of our appendix,
22 and I'll get the exact number. It's at our Appendix of
23 Evidence, page 2,199.

24 **THE COURT:** And what Talking Points are you talking
25 about?

1 **MR. DAVIDSON:** It was -- it's a document that's
2 labeled "Talking Points." They were talking points that were
3 purportedly put out by the Acting Secretary of Homeland
4 Security.

5 **THE COURT:** Do we know that they actually were put
6 out?

7 **MR. DAVIDSON:** They're in public circulation. We --
8 so, yeah.

9 **THE COURT:** Well, let me ask. Does the Government
10 know what the Talking Points are?

11 **MR. ROSENBERG:** I believe I have a faint recollection
12 of it. I don't know the exact status of how they are in public
13 circulation. I think it's neither here nor there.

14 **THE COURT:** Well, wait. No. Help me understand.
15 Were DACA recipients told that they should pack their bags and
16 be ready to go?

17 **MR. ROSENBERG:** I think that for somebody who lacks
18 lawful presence in this country, which would be true of any
19 individual whose DACA status has expired and who does not
20 otherwise have deferred action, the default would be that they
21 would be removable, absent discretion exercised by DHS. And
22 that discretion does still exist in a post-DACA world.

23 **THE COURT:** Yes, possibly.

24 But Counsel is saying that your agency, when DACA got
25 eliminated, told recipients, *Pack your bags and be ready to go,*

1 or something close to that. So did that occur, or not?

2 **MR. ROSENBERG:** So I have -- my colleague has passed
3 up to me -- I believe this was in the appendix that plaintiffs
4 filed. There is a document that does say "Talking Points."
5 And I believe that language is IN there. I do not know the
6 status of that.

7 **THE COURT:** Could I see that for a second?

8 **MR. ROSENBERG:** Sure.

9 (Whereupon a document was tendered to the Court.)

10 **THE COURT:** Exhibit EEE.

11 Which one of these many Talking Points is it?

12 **MR. DAVIDSON:** It's the one at the very bottom of
13 2,199, Your Honor.

14 **THE COURT:** All right. That says, *The Department of
15 Homeland Security urges DACA recipients to use the time
16 remaining on their work authorizations to prepare for and
17 arrange for their departure from the United States, including
18 proactively seeking travel documentation, or to apply for some
19 other immigration benefits for which they may be eligible.*

20 All right. So was this actually communicated to --

21 How was this, if at all, communicated to recipients?

22 **MR. ROSENBERG:** I'm not aware of how it was, if it
23 was, at all. Maybe --

24 I mean, plaintiffs' counsel attached this to their
25 filings, so perhaps they can identify where they obtained the

1 document.

2 **THE COURT:** Well, what use was actually made of these
3 Talking Points? Were they publicly -- was this publicly stated
4 someplace?

5 **MR. DAVIDSON:** It was, Your Honor. It was circulated
6 to the -- to the media. Page 1,932 of the appendix is a news
7 article that indicates that.

8 **THE COURT:** All right. Okay, but nevertheless, isn't
9 it still the fact that on any given case, even though the bags
10 are packed, the Government could decide not to enforce
11 deportation against somebody, and still give deferred action on
12 an individual basis?

13 **MR. DAVIDSON:** It is true, Your Honor, that there is
14 residual discretion to defer action in any individual case; but
15 I don't think that changes the fact that this is a binding rule
16 of rescinding DACA.

17 So the way I would think about it is before the
18 rescission, there were two avenues by which a DACA recipient
19 could get deferred action. One was DACA. The other was
20 residual discretion that could apply in any case.

21 The Federal Government abolished one of those. So with
22 respect to the main way that these 700,000 people were able to
23 access enforcement discretion, that's been abolished.

24 **THE COURT:** But why wasn't it then required to have
25 notice and comment when DACA was created in the first instance?

1 **MR. DAVIDSON:** So DACA -- for any individual DACA
2 applicant, you had to meet the threshold criteria; but then
3 there was a case-by-case evaluation made for every single one
4 of the 800,000 people who applied. And there was an individual
5 decision to give them the benefits of the DACA program.

6 So that's a discretionary program. It didn't give anybody
7 an entitlement. It wasn't binding on the agency, because in
8 any individual case they didn't have to grant DACA. So that's
9 a nonbinding policy statement that usually doesn't receive
10 notice and comment.

11 Now, I would say that even if the Court disagreed with me
12 on that, and found that notice and comment was required for the
13 DACA program, the APA is very clear that the repeal of a rule
14 stands in the same shoes as the issuance of a rule. So even if
15 the rule is defectively promulgated in the first instance, or
16 has a defect, that doesn't mean you can ignore notice and
17 comment. You still have to do notice and comment.

18 **THE COURT:** Where is the decision that says that? I
19 thought there was some case somebody cited that said if it
20 wasn't done by notice and comment to start, then you don't need
21 notice and comment to end.

22 **MR. DAVIDSON:** I don't -- I am not familiar with that
23 case, Your Honor.

24 **THE COURT:** Which is your case that goes the other
25 way?

1 **MR. DAVIDSON:** We cited three cases in our brief,
2 Your Honor. One is *Consumer Energy versus FERC*. That's 673
3 Fed. 2d., 425. That's a DC Circuit case from 1982.

4 In the Ninth Circuit -- this isn't a holding; this is
5 dicta -- but *Mada-Luna*, which is 813 Fed. 2d., at 1017.
6 Footnote 12 makes clear that the Ninth Circuit was very
7 skeptical of the Government's argument in that case that
8 because the policy had been put forward without notice and
9 comment, that that meant that it could be repealed without
10 notice and comment.

11 And then the other case I would point the Court to is the
12 *Parco* case, 426 Fed. Supp., 976. That was from Judge Becker in
13 the Eastern District of Pennsylvania at 1977. I wouldn't
14 ordinarily cite that case to the Court, except that case is, as
15 far as anyone is aware, the only time in which the termination
16 of a deferred action program has been analyzed for purposes of
17 notice-and-comment rulemaking under the APA.

18 And in that case the enforcement policy -- it involves
19 third-preference visas -- was not promulgated through notice
20 and comment; but nonetheless, Judge Becker found that the
21 abolition of that program did need to go through
22 notice-and-comment rulemaking. And he set aside the abolition
23 of that program as a result.

24 **THE COURT:** That was 426 F. Supp. what?

25 **MR. DAVIDSON:** 976.

1 **THE COURT:** Not 2d., but just F. Supp.?

2 **MR. DAVIDSON:** F. Supp. It's a venerable case.

3 **THE COURT:** All right. What do you say to those
4 decisions?

5 **MR. ROSENBERG:** So I could start with *Parco*, Your
6 Honor, which is an older, out-of-Circuit District Court opinion
7 that, in fact, did not involve deferred action. And it's
8 factually distinguishable from the situation that we have here.

9 That was a habeas corpus case involving an individual
10 petitioner regarding the refusal of the Government to extend
11 that individual's voluntary departure privilege, which is a
12 different form of relief, as I understand it, from deferred
13 action, which is entirely discretionary.

14 There was also a factual difference in that case, in that
15 the Court relied upon a stipulation that the petitioner's
16 application would have been approved, but for a change of
17 policy, which put it into a different situation than what we
18 have here, which is a rescission memo that is entirely -- that
19 reflects entirely discretionary policy.

20 And the Court does have it correct that in a post-DACA
21 world, there is still prosecutorial discretion to grant
22 deferred action to individuals on a case-by-case basis. And
23 it's that nature of discretion which fundamentally undercuts
24 any notion that notice and comment is necessary, because this
25 is not a binding rule.

1 If anything, Your Honor, the rescission memo reverts to
2 the status quo that existed before the DACA policy came in to
3 existence; and that status quo was that DHS exercised
4 discretion on a case-by-case basis. And that's the opposite of
5 a binding rule that would require notice and comment.

6 **THE COURT:** All right. Let me ask you both this
7 question. It's kind of the flip side of what we've been
8 talking about. Under DACA, if someone is accepted into the
9 program, isn't it still the case that the Government in any
10 individual case concerning a recipient of DACA can nevertheless
11 decide they're going to deport them, notwithstanding that
12 they're in DACA, you know, and commence a proceeding to do so?
13 Do you both agree that that's the way the DACA works?

14 It may be rare that that happens; but nevertheless, the
15 authority is still there to do that. True?

16 **MR. ROSENBERG:** That is my understanding.

17 And the reason I have that understanding and I think the
18 reason that the Court is correct about that is because it's
19 inherent in the very nature of deferred action. It is an
20 exercise of prosecutorial discretion by the Government. And
21 that exercise of discretion can be revoked at any time. And,
22 indeed, the various memos that create the DACA policy note that
23 deferred action in DACA can be rescinded at any time for any
24 reason.

25 **THE COURT:** Do you agree, as well?

1 **MR. DAVIDSON:** There certainly was authority to
2 rescind an individual's DACA status. Certainly, if they -- if
3 they committed a crime, for instance, that made them not
4 eligible.

5 **THE COURT:** It doesn't even have to be that. Of
6 course, if they committed a crime.

7 But I think in the documentation that creates DACA, it
8 flat-out says that the Government can revoke -- I have
9 forgotten the word that was used, but -- can decide to remove
10 somebody, even though they had complied with the DACA program.

11 **MR. DAVIDSON:** I agree that it already existed,
12 Your Honor.

13 I don't know that it's unreviewable discretion, even in
14 that case, though. There have been several courts that have
15 considered revocations of individual DACA status that have
16 nonetheless proceeded to review DACA.

17 **THE COURT:** Well, I'm not getting into whether it's
18 reviewable.

19 I'm just saying -- I'm just asking: Do you both agree
20 that once you're in the program, you're still subject to the
21 possibility that the DHS could decide to deport you?

22 **MR. DAVIDSON:** Yes.

23 **THE COURT:** All right. And you?

24 **MR. ROSENBERG:** On that, Your Honor, actually I do
25 have some documentation on that. USCIS Frequently Asked

1 Questions.

2 Question Number 27 asks: Can a deferred action under the
3 DACA process be terminated before it expires?

4 Answer: Yes. DACA is an exercise of prosecutorial
5 discretion. And deferred action may be terminated at any time,
6 with or without a notice of intent to terminate, at DHS's
7 discretion.

8 **THE COURT:** What record is that in?

9 **MR. ROSENBERG:** This is Document 12-4 on the docket.
10 I believe it is one of the Frequently Asked Questions that's
11 been put before --

12 That's actually -- I'm sorry. Let me take that back.

13 **THE COURT:** Is that in the Administrative Record, or
14 is that in some other record?

15 **MR. ROSENBERG:** You know, this looks like it is a
16 Frequently Asked Question. I'm sure that it's in -- in --
17 before the Court here. And I do have a current version of
18 Frequently Asked Questions that I can --

19 **THE COURT:** Well --

20 **MR. ROSENBERG:** -- provide. And it looks like that
21 was filed in the New York litigation.

22 **THE COURT:** Well, give me one that's in this case.

23 **MR. ROSENBERG:** Give me one second, Your Honor.

24 **THE COURT:** Do you know? Do you know where that
25 document is in our record?

1 **MR. DAVIDSON:** I think it is attached to our Motion
2 for Provisional Relief. And I'm sure my colleagues will be
3 able to track it down.

4 **THE COURT:** Maybe one of the many lawyers over there
5 will leap to the occasion.

6 **MR. ROSENBERG:** It is also supplemented. Even if
7 it's not, it would not be part of the Administrative Record. I
8 believe it probably has been filed with the Court; but even if
9 it has not, it's something of which this Court can take
10 judicial notice.

11 **THE COURT:** Well, I'd just like to be able to find
12 it. Can you give me a copy right now?

13 **MR. ROSENBERG:** Of course.

14 (Whereupon a document was tendered to the Court.)

15 **THE COURT:** Okay. So it's been handed up to me.

16 **MR. DAVIDSON:** I think we've got the record cited.
17 It would be in our Appendix of Exhibits at 1,756.

18 **THE COURT:** Okay. Thank you.

19 Question 27.

20 All right. But there were other places -- some other
21 place that I think is in the Administrative Record where
22 something similar to that was said.

23 Well, anyway, here's why I ask that question. Under --
24 under pre-DACA, discretion was exercised on an individual
25 basis.

1 Under DACA, it's a programmatic thing; but nevertheless,
2 it could be revoked on an individual basis.

3 So isn't the principal difference between the two regimes
4 that under DACA, the recipient signs up and gets a work permit;
5 whereas under the preexisting regime, there was no work permit?
6 So that's -- and the work permit allows the recipient to get a
7 Social Security number, pay taxes, help the economy, help the
8 country. So isn't that the main difference here between the
9 two universes --

10 **MR. DAVIDSON:** I don't know if that --

11 **THE COURT:** -- is the work authorization?

12 **MR. DAVIDSON:** I don't know if that's quite right
13 Your Honor I think if you get deferred action, you are eligible
14 for a work authorization under even under the residual -- the
15 residual discretionary authority.

16 The way I would think --

17 **THE COURT:** Wait. Say that again. You mean even
18 before DACA, you could get a work permit?

19 **MR. DAVIDSON:** Yeah. The work permit comes from the
20 Code of Federal Regulations. And it ties the availability of a
21 work permit to getting deferred action through any of the
22 authorities by which you could get deferred action.

23 **THE COURT:** But let's say before DACA, if you weren't
24 signed -- how would you even sign up for deferred action?

25 **MR. DAVIDSON:** Well, you might -- you might sign up

1 for it under one of the many other deferred action programs
2 that exists, you know. For instance, victims of domestic
3 violence.

4 **THE COURT:** Well, let's say you don't qualify for any
5 of those other deferred action programs.

6 **MR. DAVIDSON:** Yeah.

7 **THE COURT:** How would you get it then?

8 **MR. DAVIDSON:** There would not be a sign-up process.
9
10 I take it that, in general, deferred action would be
11 issued as part of an enforcement proceeding where the
12 Government says, *Actually, we're going to not enforce against*
13 *you, and you can stay.* And that could be for a number of
14 reasons, such as you have U.S.-citizen children, and maybe we
15 don't want to remove you right now.

16 The way I would think about this, Your Honor, is that the
17 creation of the DACA program created a new form of discretion;
18 a programmatic exercise of discretion.

19 And by taking that away, you take away the main route for
20 these particular individuals to get access to that discretion.

21 A clear consequence of that -- just to show one area where
22 there's a complete lack of discretion -- advanced parole. The
23 ability to petition the Government in advance to leave the
24 country, but be able to return.

25 The day that DACA was rescinded, the directive was: All
26 pending advanced parole applications will be denied, and the

1 fees will be returned. Any future advanced parole applications
2 will be rejected.

3 And we've put in a factual record showing that that is
4 exactly what happened. So one of our UC students, Joel Santi
5 (phonetic), was going to go to an academic conference in
6 Europe. Prior to the rescission he had applied for advanced
7 parole. And then once DACA was rescinded, that was rejected.

8 That's nondiscretionary. And that's the kind of binding
9 act that requires notice-and-comment rulemaking.

10 **THE COURT:** All right. You get the last word.

11 **MR. ROSENBERG:** A couple of points, Your Honor.

12 First of all, I have a couple of additional citations for
13 the discretionary nature of deferred action. The same FAQs
14 appear at Docket Entry 121-1, page 174; but I think the Court
15 may also have been thinking about the 2014 memorandum from
16 J. Johnson that expanded DACA and created DAPA. And in that
17 memorandum, which is found in the Administrative Record,
18 Document 64-1, on page 38, the memo notes that as an act of
19 prosecutorial discretion, deferred action is legally available,
20 as long as it is granted on a case-by-case basis. And it may
21 be terminated at any time at the agency's discretion.

22 **THE COURT:** That's, I think, what I am remembering;
23 but I think there was something in 2012 that said the same
24 thing.

25 **MR. ROSENBERG:** It may very well have said the same

1 thing. That agency has been quite consistent in its position
2 regarding the discretionary nature of DACA, which is part of
3 why we believe that plaintiffs have failed to state a claim
4 under the APA or under any of their constitutional claims.

5 **MR. DAVIDSON:** May I just mention one thing,
6 Your Honor, which is that the *Texas* case, which the Government
7 loves, rejected the exact argument that they're making now.
8 The *Texas* case found that the creation of the DAPA program did
9 require notice-and-comment rulemaking.

10 **THE COURT:** Did?

11 **MR. DAVIDSON:** It did.

12 **THE COURT:** Well, yes, but that was the creation. So
13 why wouldn't that also apply to the creation of DAPA -- DACA?

14 **MR. DAVIDSON:** All right. Well, I think that the
15 *Texas* Court didn't get things completely right in a lot of
16 dimensions, but that's just to say that it's not an
17 uncontested proposition that the rescission of the deferred
18 action programs or the creation of deferred action programs can
19 be done without notice and comment.

20 **THE COURT:** Okay. We've got to move on. Let's go to
21 the preliminary injunction, provisional relief, and 701,
22 arbitrary, capricious, not otherwise in accordance with law.

23 So let's hear -- are you arguing that, too?

24 **MR. DAVIDSON:** Yes, Your Honor.

25 **THE COURT:** All right. So please go ahead.

1 **MR. DAVIDSON:** Agency action must be set aside if
2 it's arbitrary and capricious, or an abuse of discretion.
3 Agencies are required to consider the relevant factors, and
4 they have to articulate a rational connection between the facts
5 that they find and the action that they take.

6 I want to focus on an important dimension of the
7 rescission, which is that it is a 180-degree reversal of a
8 prior policy. And it's not just reversing the prior
9 Administration's policy. It's reversing this own
10 Administration's policy in February 2017 to leave DACA intact.

11 What that means is that the agency needed to consider the
12 considerations that prompted DACA to be created in the first
13 place, as well as the reliance interests that had accrued to
14 its beneficiaries over time.

15 Now, we have already gone through the case law about the
16 import of agencies considering reliance interests. And the
17 fundamental case is a case about employees of car dealerships.
18 And, with due respect to the interests of the car dealerships,
19 the reliance interests here are the most profound you can
20 possibly imagine. There are 700,000 people in the
21 United States who have restructured their lives in fundamental
22 ways in reliance on the existence of the DACA program.

23 Just a few examples.

24 DACA recipients have enrolled in degree programs,
25 including medical school or law school, in reliance on the fact

1 that they would have deferred action, and would be able to
2 become practicing lawyers and practicing physicians in the
3 United States.

4 They have taken out student loans -- in some cases,
5 hundreds of thousands of dollars of student loans -- in order
6 to obtain those degrees.

7 They've taken on new jobs. The statistics are that
8 54 percent of DACA recipients became employed for the first
9 time in reliance on the work authorizations that DACA provided.
10 They made fundamental decisions about marriage, and whether to
11 have children. They bought cars and they bought homes. They
12 started businesses, and are employing other people.

13 Even aside from DACA recipients, themselves, the schools
14 that educate them, the employers that employ them have invested
15 time, money, training resources into the DACA recipients, in
16 reliance on the existence of the program.

17 The Government considered none of this, at all, when they
18 decided to rescind DACA. And it's symptomatic of the
19 rescission's failure to consider any of the policy factors that
20 would be relevant to a decision of this magnitude.

21 There was zero consideration given to the fundamental
22 issue of the welfare of the DACA recipients, themselves. There
23 was zero consideration given to the welfare of the children of
24 DACA recipients or their families. There are 200,000
25 U.S.-citizen children of DACA recipients who are facing the

1 choice between departing the country of their citizenship, or
2 losing their parent.

3 There was zero consideration of the effects on employers
4 or educational institutions.

5 There was zero consideration of the effects on our
6 national economy or on the Treasury.

7 And you don't need to take my word for it that they didn't
8 consider any of these factors. In their Reply Brief at the
9 Supreme Court, the Government said -- and I quote -- "The
10 decision was not based on any factual findings or particular
11 evidentiary record." That's their Reply Brief in support of
12 their stay, on the first page.

13 In our Motion for Provisional Relief we have robustly
14 documented the horrific consequences of the rescission, and the
15 failure of the Government to consider any of those consequences
16 when they undertook the rescission. And so we would ask for
17 factual findings that the Government completely failed to
18 consider those factors, and that those factors needed to be
19 considered in order for there to be rational agency action.
20 When an agency doesn't consider the relevant factors to its
21 decision, that decision needs to be set aside.

22 Let me focus on another element of what the Government
23 didn't consider, at all, in rescinding DACA, which is
24 alternative policies that were available. Now here, the
25 Government's supposed problem with the DACA program was that it

1 was vulnerable to litigation risk from the Fifth Circuit.

2 Now, the Fifth Circuit found that the DAPA policy that it
3 was considering was defective for very specific reasons. They
4 found that the DAPA policy was not discretionary enough. And
5 the Court gave two reasons.

6 It said, number one, there was a standardized form -- a
7 kind of a checklist -- which was used to guide agents'
8 discretion in awarding DAPA, or not.

9 And then it said that the DACA process was undertaken at
10 service centers rather than at DHS Field Offices, and that
11 in-person interviews were not conducted.

12 So if those were the problems that led the Fifth Circuit
13 to conclude that DAPA was illegal, because it didn't have
14 enough discretion, there's an obvious alternative policy. Do
15 it at the Field Offices. Don't do it at the service centers.
16 Don't use the checklists, or use a shorter checklist that has
17 more discretionary elements. Do an in-person interview.

18 Those are obvious alternative policies that might have
19 been able to preserve, if not all, most of the benefits of the
20 DACA policy, without confronting anywhere near the same
21 litigation risk that the policy -- that the Government's
22 decision is supposedly based on.

23 And a failure to consider alternative policies is, alone
24 sufficient to set aside the rescission as an irrational
25 exercise of the agency's authority.

1 **THE COURT:** Now, what's the law that says that?

2 **MR. DAVIDSON:** Let me give you a couple of cases,
3 Your Honor. One is *State Farm*, 463 U.S. 29. That's a 1985
4 decision. And there, the question was passive restraints in
5 vehicles. And the Government found that automatic seat belts
6 are not a useful passive restraint. And the policy -- and
7 decided we're not going to have any passive-restraint
8 regulation.

9 And the Supreme Court said, *Wait a second. You didn't*
10 *consider an obvious alternative policy, which is airbags.* And
11 the Supreme Court said, and I quote, *At the very least, this*
12 *alternative way of achieving the objectives of the Act should*
13 *have been addressed, and adequate reasons given for its*
14 *abandonment.*

15 And let me give you a Ninth Circuit case, as well:
16 *Mt. Diablo Hospital versus Shalala*, 3 Fed. 3d. 1226. And the
17 quotation -- I don't have the pin cite, but we can get it for
18 you -- is, quote, *Agency actions cannot be sustained where the*
19 *agency has failed to consider significant alternatives.*

20 **THE COURT:** Now, are those cases where there was a
21 statute, and the statute called out balancing of factors, or
22 risks and benefits; costs and benefits? Some statutes do that.
23 And I can see the Supreme Court saying, *Okay. You failed to do*
24 *what Congress said, because you were supposed to do all of this*
25 *weighing. Weighing.*

1 But we don't have a statute like that in our problem. So
2 is that the way -- was that the context of those decisions?

3 **MR. DAVIDSON:** It certainly was not in *State Farm*,
4 Your Honor. In *State Farm* it was the Motor Vehicle Safety Act,
5 which said that the Government should basically promulgate
6 reasonable regulations to promote vehicle safety. So it wasn't
7 a statute that explicitly said, for example, you have to
8 consider cost or compliance.

9 **THE COURT:** Well, what was the word in the statute
10 that was the hook that the Supreme Court used to say you have
11 to consider alternatives?

12 **MR. DAVIDSON:** Well, *State Farm* is interesting. It
13 doesn't use the statutory hook to come to that conclusion. It
14 says that an element of a rational decision-making process that
15 can withstand arbitrary and capricious review is that you have
16 to consider obvious alternatives. So it didn't rely --

17 **THE COURT:** Read that language to me. That would be
18 very good for you, if that is, in fact, what it says, without
19 any hook in the statute.

20 **MR. DAVIDSON:** That's my gloss on it, Your Honor.

21 The point I'm trying to make is that it doesn't -- if you
22 read the case, it doesn't rely on a particular -- it doesn't
23 say the statute requires you to consider all alternative
24 possibilities, and you didn't do that.

25 It found it as a result of procedural rationality.

1 **THE COURT:** That's what I want to hear. Maybe your
2 team can give me a copies of that decision. Here it comes.
3 (Whereupon a document was tendered to the Court.)

4 **MR. DAVIDSON:** Very good. It's page 48 of the
5 decision, Your Honor.

6 **THE COURT:** This is -- this is the U.S. Reports?

7 **MR. DAVIDSON:** This is the U.S. Reports.

8 **THE COURT:** I got handed something. So I have to
9 figure out where the -- one of those things where -- okay.
10 Here's 45. What page? Forty-eight?

11 **MR. DAVIDSON:** Forty-eight, Your Honor.

12 **THE COURT:** All right. I may have it. Looks like I
13 have it. Okay. What --

14 **MR. DAVIDSON:** I would start with, *Given the effect*.
15 It's in the second paragraph.

16 **THE COURT:** Yeah. I see that. All right.

17 (Reading.) *Given the effectiveness described to the*
18 *airbag technology by the agency, the mandate of the Safety Act*
19 *to achieve traffic safety would suggest that the logical*
20 *response to the faults of detachable seatbelts would be to*
21 *require the installation of airbags. At the very least, this*
22 *alternative way of achieving the objectives of the Act should*
23 *have been addressed, and adequate reasons given for its*
24 *abandonment; but the agency not only did not require compliance*
25 *through airbags. It did not even consider the possibility in*

1 its 1981 rulemaking.

2 Now, one sentence of the rulemaking statement discusses
3 the airbags-only option, because, as the Court of Appeals
4 stated, NHTSA's analysis of airbags was nonexistent. What we
5 said in *Burlington* is apropos here.

6 Then there's a long quotation. The long quotation says,
7 *There are no findings and no analysis here to justify the*
8 *choice made; no indication of the basis on which the agency*
9 *exercised its expert discretion. We're not prepared to and the*
10 *APA will not permit us to accept such practice. Expert*
11 *discretion is the lifeblood of the administrative process, but*
12 *unless we make the requirements for administrative action*
13 *strict and demanding, expertise, the strength of modern*
14 *government, can become a monster which rules us with no*
15 *practical limits on its discretion.*

16 Sounds like a Frankfurter decision. Who wrote that
17 decision?

18 **MR. ROSENBERG:** I believe it was Justice White.

19 **THE COURT:** Okay. So all right. So what do you say?
20 What does the Government say to the proposition that when you
21 have APA review --

22 Now I know you say we shouldn't have APA review; but at
23 this point we're assuming for the sake of argument that you've
24 lost that point, and we're in the realm of arbitrary and
25 capricious. So within that realm of arbitrary and capricious,

1 these quotations seem to be indicating that you've got to do
2 some -- you've got to explain the pros and cons and exercise
3 expert discretion, and show that you're the expert, and not
4 just say to the world, *You've got to take our word for it.*

5 Okay. Go ahead.

6 **MR. ROSENBERG:** Sure, Your Honor. Let's go back to
7 page 48, and the paragraph that you just read. And I would
8 direct the Court to the language indicating that the mandate of
9 the Act is to achieve traffic safety. All right? So this is
10 the an APA case under a statute that has a specific directive
11 of achieving traffic safety.

12 And then if you turn to page 43 of the opinion, where the
13 Court sets forth the standard, in looking at the Supreme Court
14 Reporter version of this case, left-hand side of the two
15 columns, it says, *Normally an agency rule would be arbitrary*
16 *and capricious if the agency has relied on factors which*
17 *Congress has not intended to consider, entirely failed to*
18 *consider an important aspect of the problem, offered an*
19 *explanation that runs counter, et cetera.*

20 Presumably, plaintiffs here are relying upon that second
21 clause, *entirely failed to consider an important aspect of the*
22 *problem.*

23 While in *State Farm* the substantive statute sets forth the
24 the problem: Automobile safety. And the Court found that the
25 agency failed to consider an important aspect of that problem.

1 Here, there is nothing in the INA that addresses deferred
2 action; certainly not in this context. It's not something that
3 the agency could -- was required to consider, when plaintiff
4 discusses all of the economic and other effects of the
5 rescission of deferred action.

6 And I'd direct the Court to the case *State of New York*
7 *versus Riley*. I have a copy of the decision if the Court would
8 like it, but that's 969 F. 2d. 1147.

9 (Whereupon a document was tendered to the Court.)

10 **THE COURT:** All right. Go ahead. Make your point.

11 I would like --

12 Is it a clean copy, though? I don't want a --

13 **MR. ROSENBERG:** It does have a few highlights, but
14 not any margin notes.

15 **THE COURT:** Why don't you say out loud what you want
16 me to consider?

17 **MR. ROSENBERG:** Page 1,150 of the decision, the Court
18 noted that because Congress did not assign the specific weight
19 the administrator should accord each of these factors that were
20 being considered in the context of this APA challenge, the
21 administrator is free to exercise his discretion in the area.
22 And here, as my colleague --

23 **THE COURT:** Wait, wait. Give me that cite.

24 **MR. ROSENBERG:** Sure. It's *State of New York versus*
25 *Riley*, 969 F. 2d. 1147. It's a DC Circuit opinion from 1992.

1 And the particular language -- and we quote this in our
2 brief -- one of our briefs -- appears on page 1,150.

3 **THE COURT:** Well, still, though, the quotation from
4 Justice White seemed to be tied into the APA, though, and what
5 it requires, saying expert discretion is the lifeblood of the
6 administrative process. And the word "expertise" is
7 italicized, for emphasis.

8 In saying that there's got -- we're going to have judges
9 review under the APA the agency has got to actually exercise
10 its expertise. And the way they do that is through a reasoned
11 analysis.

12 And here, this was a very abbreviated analysis. Right?

13 **MR. ROSENBERG:** Well, let me address that. And there
14 are a couple of different layers that I'd like to address, if I
15 could have a few moments, from the specific to the more
16 general.

17 **THE COURT:** All right. Please take -- go ahead.

18 **MR. ROSENBERG:** So, you know, on the specific
19 analysis -- and this, again, you know, echoes the argument of
20 my colleague. The fundamental problem here is that the
21 analysis that plaintiffs would like the agency or this Court
22 directing the agency to undertake are entirely made up, because
23 there's no substantive standard that they can point to in the
24 underlying statute -- the INA -- that requires the agency to
25 analyze the very points that plaintiffs have made.

1 Now, they have some very creative arguments that they've
2 set forth in their brief as to all sorts of different factors
3 that they would have liked the agency to consider, but all of
4 those factors are completely unmoored from any standard that
5 the agency would have been required to apply in the first
6 instance. And so that puts this Court in the position of
7 having to second-guess the agency's action, without applying
8 any standard.

9 And, of course, as this Court is aware, the arbitrary and
10 capricious standard is a very narrow standard. It's a very
11 high threshold that the Court would have to find for the agency
12 to have acted arbitrarily and capriciously. And we don't think
13 that the agency's done so here.

14 Taking a step back, in terms of the analysis, we would
15 posit that there actually is analysis within the rescission
16 memorandum regarding the impacts of the policy. One of the
17 arguments that plaintiffs have made that they've criticized the
18 Government for is the fact that the decision was made to allow
19 current DACA recipients to retain their status until the end of
20 their current terms, as well as applying -- allowing
21 individuals whose DACA status would expire before March 6th a
22 30-day window with which to seek one last renewal.

23 But that policy -- implicit in that policy and explicit in
24 that policy is the notion that, in winding down the program,
25 there are a lot of additional challenges, and that individuals

1 who currently have DACA status are enjoying that status.

2 And so, in fact, the agency did take into account the
3 considerations that plaintiffs are arguing here that it would
4 be disruptive to individuals' lives, by not winding down the
5 policy immediately, but allowing any individual who currently
6 has DACA status to retain that status through the end of their
7 current term. And so in that sense, certainly, when you look
8 at the memo and the manner in which the policy is coming down,
9 it does take into account many of the factors that plaintiffs
10 have identified.

11 **THE COURT:** Let's make sure I understand. I think I
12 was confused on this very point, myself.

13 March 5 is what was said to be the termination date when
14 this termination was announced; but I think what you're saying
15 is that on March 30 -- just to take a random date, on
16 March 30th there will still be a lot of DACA recipients who'll
17 have the protection of DACA. And gradually, as their DACA
18 periods -- their two-year periods run out, they will continue
19 to do that. So even through the end of this coming year, to
20 the end of 2018, there will be some number of DACA recipients
21 who will still be in the program. Is that true, or not?

22 **MR. ROSENBERG:** There will be quite large -- that is
23 true, but we refer to it as a policy, and not a program. But
24 that is true.

25 And, in fact, there will be quite a large number of DACA

1 recipients who'll continue to enjoy employment authorizations
2 in 2018, and in 2019, and likely in 2020, because an individual
3 whose status expires -- whose status will have expired between
4 September 5th and March 5th had a 30-day opportunity to seek
5 renewal of their DACA status; one last opportunity.

6 Let's say that that request was approved by USCIS today,
7 December 20th, 2017. That means that that individual will then
8 retain that new DACA status through December 20th, 2019.

9 And, importantly, no individual who currently has DACA
10 status is having that status being taken away from them as a
11 result of the rescission policy.

12 So to the extent that plaintiffs are arguing that the
13 policy doesn't take into account various interests that
14 individuals may have, we would say that the way that the policy
15 was structured and the wind-down of the policy, which, in
16 essence, is an entirely discretionary policy in the first
17 place, did try to take that -- those factors into account.

18 But I think, taking a step back more generally -- and this
19 is --

20 **THE COURT:** Wait. What is it that happens on
21 March 5, then? What --

22 **MR. ROSENBERG:** So somebody whose --

23 **THE COURT:** What happens on March 5 that is so
24 important?

25 **MR. ROSENBERG:** So on September 5th, the wind-down

1 was announced. Individuals whose DACA status expires, for
2 example, on March 6th would not have an opportunity or would
3 not have had an opportunity to renew their status. And so
4 starting after March 5, individuals whose DACA status would
5 expire -- you know, their status will expire. And it will be a
6 slow wind-down, because each additional day, some additional
7 individuals' status will expire over time.

8 **THE COURT:** All right. So take a concrete example.
9 Let's say somebody's -- some DACA recipient was approved for
10 the program -- for the policy. And their expiration date was
11 in April of next year. So they would not be able to renew. Is
12 that correct?

13 **MR. ROSENBERG:** That is correct.

14 **THE COURT:** And so, come April, they will be out of
15 the policy?

16 **MR. ROSENBERG:** That is correct.

17 **THE COURT:** All right. Now I think I've got it.

18 So there will be a -- not a total cliff of hundreds of
19 thousands; but there will be a wind-down for about 680,000
20 people over a two-year period?

21 **MR. ROSENBERG:** That is correct.

22 **THE COURT:** All right. Still, if we're in the realm
23 of, *It is reviewable* --

24 I know you say it's not reviewable; but let's say you lose
25 that, and it is reviewable.

1 The reason that was given was that the program was illegal
2 to begin with, under the Fifth Circuit. And the
3 Attorney General said it was an unconstitutional exercise of
4 the President's authority. And --

5 So can't the judge -- a judge can review that.

6 **MR. ROSENBERG:** So let me -- let me -- let me take a
7 step back on that. And this was something, I believe, that we
8 discussed at the last time I was here.

9 The principal reason that was provided for the wind-down
10 of DACA was litigation risk. That -- the DACA -- expanded DACA
11 and DAPA policies were challenged in the Southern District of
12 Texas, by Texas and a group of other states.

13 The District Court Judge in the Southern District of Texas
14 entered a nationwide preliminary injunction that was appealed
15 to the Fifth Circuit. The Fifth Circuit affirmed. And the
16 Supreme Court, in a 4-4 decision, because it was -- at the time
17 we lacked a ninth Justice -- affirmed, leaving the
18 Fifth Circuit's decision in place. That is, for all intents
19 and purposes, binding precedent on the Government.

20 Texas had threatened to bring -- to amend its Complaint.
21 It's not even a new lawsuit. It would have amended its
22 Complaint that was currently in front of the same
23 District Court judge.

24 **THE COURT:** Oh, wait. Let's be clear. Stop there
25 for a second.

1 There was 10 states, out of the 26?

2 **MR. DAVIDSON:** Nine states, Your Honor.

3 **THE COURT:** All right. Let's say nine states out of
4 the twenty six wrote that letter.

5 And why wouldn't laches have been a problem?

6 See, for DAPA -- D-A-P-A -- there was no laches problem,
7 because they sued right away.

8 But for DACA, which had been on the books for five years,
9 doesn't the APA recognize laches as a basis for denying relief?
10 I think it does, but you tell me.

11 **MR. ROSENBERG:** Okay. So a couple of points on
12 laches. A big-picture point: Plaintiffs present a series of
13 arguments that they claim that the Government could have made
14 in the Southern District of Texas.

15 It is not our burden in this case to disprove all of the
16 arguments that plaintiffs have made. The standard is whether
17 or not the Acting Secretary's decision confronting the
18 litigation risk presented by the Texas AG's letter was
19 arbitrary and capricious. And in light of the substantial
20 litigation that the Government would have faced to predict
21 whether or not a laches argument would have been successful is
22 beside the point.

23 But as to the laches argument, itself, what that argument
24 ignores is an interchange of intervening circumstances, which
25 is between the time that Texas brought the DAPA lawsuit and the

1 time that it threatened to amend its Complaint to bring a claim
2 regarding DACA, Texas had obtained a very favorable opinion
3 from a District Court Judge in Texas, as well as a subsequent
4 opinion from the Fifth Circuit. And so in that regard, the
5 circumstances would have been changed, such that --

6 **THE COURT:** Well, what so favorable? Tell me.

7 Because didn't both judges say this is -- this opinion concerns
8 DAPA, D-A-P-A, not DACA. I think I read that in both
9 decisions.

10 **MR. ROSENBERG:** So that answer's a little bit more
11 complicated. It does primarily involve DAPA; but also before
12 the Court was what was called "expanded DACA," which was the
13 subject of --

14 **THE COURT:** Okay. Three limited things. Throwing
15 out the baby with the bathwater, but we're -- the other side
16 concedes the 2014 year. We're talking about the 2012.

17 **MR. ROSENBERG:** Right, but at the end of the day the
18 Fifth Circuit -- the District Court Judge entering a
19 preliminary injunction relied, and the Fifth Circuit affirmed,
20 relying upon a finding of a lack of discretion in the exercise
21 of DACA.

22 And that's the problem in terms of the administration
23 of -- of the DACA policy, is that the Government would have had
24 to argue, notwithstanding the Fifth Circuit's decision that the
25 Government's assertions that the exercise of discretion was

1 pretextual, that the District Court should ignore that
2 Fifth Circuit holding, which would have been binding precedent
3 in front of a District Court Judge who had already enjoined
4 expanding DACA.

5 **THE COURT:** It's been a few days since it read it,
6 but I did read the Fifth Circuit decision. And I could have
7 sworn there were statements in there that would have given a
8 lot of hope to the Government that DACA would be treated
9 differently.

10 No? Am I -- maybe I'm remembering something else.

11 **MR. ROSENBERG:** No.

12 **THE COURT:** Isn't that true?

13 **MR. ROSENBERG:** I don't think so. At least, I don't
14 read the opinion, perhaps, the same way as the Court did.
15 Certainly, the Government and the Department of Justice don't
16 read the opinion the same way that the Court did.

17 The Court rejected the argument. And we made the
18 arguments, Your Honor. We argued forcefully and strenuously
19 that DACA was an exercise of prosecutorial discretion that was
20 actually administered in a discretionary manner. And those
21 arguments were rejected. Those arguments were rejected by the
22 District Court Judge.

23 **THE COURT:** Read to me where the Fifth Circuit
24 rejected that argument.

25 **MR. ROSENBERG:** I believe it might be footnote 191 of

1 the *Texas* opinion. If you give me a moment, I could find it.

2 **THE COURT:** Is this in the Court of Appeals?

3 **MR. ROSENBERG:** Yes.

4 **THE COURT:** I don't have that up here with me.

5 Maybe, again, somebody could hand that up.

6 **MR. DAVIDSON:** Do you have the Administrative Record,
7 Your Honor? It's in there.

8 **THE COURT:** I do have that. Okay. Where should I
9 look?

10 **MR. DAVIDSON:** All right. You should look starting
11 at Administrative Record 130.

12 **MR. ROSENBERG:** It's not footnote 191, but we're
13 looking for it right now.

14 **THE COURT:** I'm sorry. What page should I look at?

15 **MR. ROSENBERG:** So, Your Honor, if you look at page
16 173.

17 **THE COURT:** Of the --

18 **MR. ROSENBERG:** Of the *Texas* Fifth Circuit opinion
19 809 F. 3d. 134.

20 **THE COURT:** But in the Administrative Record, is that
21 173?

22 **MR. ROSENBERG:** Yeah. It would be the same page.

23 **THE COURT:** 173 of the Administrative Record.

24 **MR. ROSENBERG:** It's page 173 of the opinion.

25 **THE COURT:** Oh. All right.

1 **MR. ROSENBERG:** Which is AR 169.

2 **THE COURT:** Okay. All right. So I'm at 169. Now,
3 I've got so many footnotes.

4 **MR. ROSENBERG:** Yeah. It's actually the headnote 35,
5 the DACA and DAPA memos.

6 **THE COURT:** All right. Here we go. I'll read it out
7 loud.

8 (Reading.) *The DACA and DAPA memos comport to grant
9 discretion, but a rule can be binding if it is applied by the
10 agency in a way that indicates it is binding. And there was
11 evidence from DACA's implementation that DAPA's discretionary
12 language was pretextual. For a number of reasons, any
13 extrapolation from DACA must be done carefully. First, DACA
14 involved issuing benefits to self-selecting applicants, and
15 persons who expected to be denied relief would seem unlikely to
16 apply; but the issue of self-selection is partially mitigated
17 by the finding that the Government has publicly declared that
18 it will make no attempt to enforce the law against even those
19 who are denied deferred action, absent extraordinary
20 circumstances.*

21 *Second, DACA and DAPA are not identical. Eligibility for
22 DACA was restricted to a younger and less-numerous population.
23 We'd suggest that DACA applicants are less likely to have
24 backgrounds that would warrant discretionary denial. Further,
25 the DAPA memo contains additional discretionary extra criteria.*

1 *Applicants must not be an enforcement priority, as reflected in*
2 *the prioritization memo, and must present no other factors*
3 *that, in the exercise of discretion, make the grant of deferred*
4 *action inappropriate.*

5 *But despite those differences, there are important*
6 *similarities. The Secretary directed USCIS to establish a*
7 *process similar to DACA for exercising prosecutorial*
8 *discretion. And there was evidence that the DACA application*
9 *process, itself, did not allow for discretion, regardless of*
10 *the rates of approval and denial. Instead, in relying solely*
11 *on the lack of evidence that any DACA application has been*
12 *denied for discretionary reasons, the District Court found*
13 *pretext for additional reasons, and observed that the operating*
14 *procedures for implementation of DACA contain nearly 150 pages*
15 *of specific instructions for granting or denying deferred*
16 *action to applicants, and that denials are recorded in a*
17 *check-the-box standardized form, which USCIS personnel are*
18 *provided templates. Certain denials of DACA must be sent to --*

19 It goes on and on and on, so I'm not going to --

20 So tell me. The Government should. What is your point on
21 this? Remind me of what your point is.

22 **MR. ROSENBERG:** The point, Your Honor -- there's also
23 some language for the Court's awareness on page 175.

24 **THE COURT:** All right. Let's read that.

25 **MR. ROSENBERG:** Footnote 140.

1 **THE COURT:** Let's read that. 140.

2 (Reading.) *The states properly maintain that these*
3 *denials were not discretionary, but instead were required*
4 *because of failures to meet DACA's objective criteria. For*
5 *example, Newfeld averred that some discretionary denials*
6 *occurred because applicants posed a public safety risk, were*
7 *suspected of gang membership or gang-related activity, and had*
8 *a series of arrests without convictions, or ongoing criminal*
9 *investigations. As the District Court aptly noted, however,*
10 *those allegedly discretionary grounds fell squarely within*
11 *DACA's objective criteria, because DACA explicitly incorporated*
12 *enforcement priorities articulated in the DACA operational*
13 *instructions, and the memorandum-style policies, et cetera, et*
14 *cetera.*

15 I don't understand what your point there is.

16 **MR. ROSENBERG:** Well, I mean, the point on that
17 footnote is that it was not discretionary.

18 And then on page 172, footnote 130, the last paragraph
19 notes that USCIS could not produce any applications that
20 satisfied all of the criteria, but were refused deferred action
21 by an exercise of discretion. And then there's a citation
22 to -- looks like the District Court's opinion.

23 **THE COURT:** I'm sorry. Where are you reading from?

24 **MR. ROSENBERG:** This is page 172, footnote 130, last
25 paragraph. And then there's a -- I'll read that again.

1 (Reading.) *USCIS could not produce any applications that*
2 *satisfied all of the criteria, but were refused deferred action*
3 *by an exercise of discretion.*

4 And then there's the cite. See it at 669. Looks like
5 that's probably the District Court's opinion.

6 **THE COURT:** I just still am not finding it. Are you
7 in the text?

8 **MR. ROSENBERG:** No. It's at page 172, footnote 130,
9 last paragraph.

10 **THE COURT:** Yeah. Oh.

11 (Reading.) *USCIS could not produce any applications that*
12 *satisfied all of the criteria, but were refused deferred action*
13 *by an exercise of discretion. All were denied for failure to*
14 *meet the criteria, or rejected for filing errors, errors in*
15 *filling out the form, or lying on the form, and failures to pay*
16 *the fees, or for fraud. Given that the Government offered no*
17 *evidence as to the bases for other denials, it was not error,*
18 *clear or otherwise, for a District Court to conclude that DHS*
19 *issued DACA denials under mechanical formulae.*

20 All right. Is that your point? So you're saying that in
21 light of that language, that you felt like you were going to
22 lose if you let them amend?

23 And then -- I don't know. Why wouldn't the Court --

24 **MR. ROSENBERG:** This was a factual finding on a
25 preliminary injunction by a District Court regarding the DAPA

1 policy, as well as expanded DACA, both of which were
2 preliminarily enjoined.

3 Texas had threatened to amend its lawsuit; file an amended
4 Complaint in the same Court in front of the same Judge
5 regarding DACA.

6 **THE COURT:** All right.

7 **MR. ROSENBERG:** And these findings were made by this
8 District Court Judge as to how DACA was administered. And the
9 District Court Judge found that, notwithstanding language in
10 the implementation memos regarding DACA about discretion, it
11 was not administered in a discretionary manner.

12 **THE COURT:** All right. What do you say? What do you
13 say to that point?

14 **MR. DAVIDSON:** Well, let me -- there's basic --

15 **THE COURT:** Before you answer that point, first,
16 before you --

17 **MR. DAVIDSON:** Yeah.

18 **THE COURT:** -- veer off --

19 And I'll let you veer off into something else.

20 **MR. DAVIDSON:** Okay.

21 **THE COURT:** Help me understand. The Government's
22 point is that there was a -- given the findings about no
23 discretion in the way that DACA has been administered, that
24 that same District Judge was likely to rule against the
25 Government. So what do you say to that point?

1 **MR. DAVIDSON:** A few points. So this is all
2 provisional. This is on provisional relief. There's no final
3 adjudication that is occurring in the *Texas* case. That's the
4 first point.

5 Second point. The District Judge, himself -- one of the
6 factors that he relied on in granting the preliminary
7 injunction was that DAPA had not yet been enacted. Knob had
8 yet gotten the benefits of the DAPA program. And that District
9 Judge said that that was a factor in favor of provisional
10 relief, because if he allowed DAPA to go into effect, the
11 policy would become, quote, "virtually irreversible," end
12 quote, and he would then confront an effort to, quote,
13 "unscramble the egg," unquote.

14 **THE COURT:** Where can I find that in this
15 Administrative Record?

16 **MR. DAVIDSON:** It would be in the -- it would be in
17 the Texas District Court decision, which begins at page 42 of
18 the Administrative Record. And the language I'm quoting from
19 is on page 124 of the Administrative Record.

20 **THE COURT:** Okay. I'm there. So what part?

21 **MR. DAVIDSON:** So if you look at headnote 74, it
22 says --

23 **THE COURT:** Wait, wait. Administrative Record, 124,
24 is page 673 of the actual Fed. Supp. Right?

25 **MR. DAVIDSON:** Correct. And if you're in the left

1 column at the paragraph break --

2 **THE COURT:** Yeah.

3 **MR. DAVIDSON:** -- it says plaintiffs additionally
4 allege that legalizing the presence of millions of people is a,
5 quote, "virtually irreversible action, once taken."

6 The Court agrees.

7 And then later on, if you go into the second column at the
8 paragraph break there, it says, *The Court agrees that without a*
9 *preliminary injunction, any subsequent ruling that finds DAPA*
10 *unlawful after it is implemented would result in the states*
11 *facing the substantially difficult if not impossible task of*
12 *retracting any benefits or licenses already provided to DAPA*
13 *beneficiaries. This genie would be impossible to put back into*
14 *the bottle.*

15 And up above he uses the "unscramble the egg" metaphor.

16 **THE COURT:** Where is that?

17 **MR. DAVIDSON:** That is above the paragraph break.
18 And around the middle of the paragraph it says, *Once defendants*
19 *make such determinations, the states accurately allege that it*
20 *will be difficult or even impossible for anyone to, quote,*
21 *"unscramble the egg."*

22 **THE COURT:** So your point is that for DACA, the egg
23 was already scrambled. So --

24 **MR. DAVIDSON:** The equities would have pointed
25 180 degrees the opposite direction, because rather than

1 stopping a program from being incepted, the District Court
2 would be called upon to enjoin 700,000 people from having
3 benefits that had already been conferred to them.

4 **THE COURT:** All right. So what do you say? What
5 does the Government say to that point?

6 **MR. ROSENBERG:** We're in the exact opposite situation
7 here, Your Honor.

8 In the *Texas* case, Texas and the other states brought a
9 preliminary injunction, because they were alleging that they
10 would be irreparably harmed by, for example, having to provide
11 licenses to individual recipients. And that was a harm that
12 you cannot unscramble after the absence of a preliminary
13 injunction.

14 If you were to take away at some later point in time the
15 benefits that these individuals were receiving, Texas and the
16 other states would have still been in a situation where they
17 would have had to provide these benefits in the first
18 circumstance. And that instance it cannot be unscrambled.

19 Here, for an orderly wind-down of the DACA policy, it's
20 actually relatively easy to unscramble the egg. If individual
21 states, including the state plaintiffs here, wish to consider
22 providing benefits in the future to the individuals, I'm not
23 aware of anything that would prevent them from doing so. All
24 that is happening is that their deferred action through the
25 framework of DACA will, over time, be taken away. And their

1 employment authorizations will expire when their deferred
2 action expires.

3 **THE COURT:** That's an important thing. Those work
4 authorizations are very important. You're going to throw
5 people on the unemployment rolls. They won't even be on the
6 unemployment rolls. Instead of being productive members of the
7 economy, they will now be unable to work legally in the
8 country.

9 **MR. ROSENBERG:** So that's -- that's -- that's a
10 policy decision. And that's a policy decision that,
11 respectfully, is not one for this Court to make.

12 **THE COURT:** Well, no. I disagree.

13 Look. You've got the Judge. You go off on this, because
14 the Judge in Texas was balancing equities and said, "Unscramble
15 the egg," and that sort of thing. All right.

16 So if there has been an amendment, let's say that -- you
17 know, I don't know where nine -- nine states get to amend for
18 twenty-six, without bringing a brand new lawsuit; but let's say
19 they got by that procedural hurdle. And let's say they got by
20 the laches problem. Then this Judge would have to consider the
21 hardship being imposed on the DACA recipients who are now going
22 to lose their work authorization because of your policy -- your
23 change in policy.

24 And that's 680,000 people in a real -- that's palpable.
25 That's a real thing.

1 Whereas in this case, DAPA -- D-A-P-A -- had not yet taken
2 effect. So the Judge was saying, *Let's stop it before it gets*
3 *started.*

4 But for DACA, it had already been in effect for five
5 years. Isn't that a real --

6 I don't know. Seems like an important difference.

7 **MR. ROSENBERG:** Four separate responses to that,
8 Your Honor. Let me start.

9 I -- I've had the opportunity and privilege of appearing
10 in front of many District Court Judges across the country. As
11 this Court may understand -- likely understands -- different
12 District Court Judges approach problems in different ways.

13 What we do know in this situation is that this is a
14 District Court Judge who had already entered an injunction
15 regarding DAPA and expanded DACA.

16 Now, I take the point about the defenses and other
17 arguments that plaintiffs claim that the Government could have
18 made; but respectfully, that's going down a rabbit hole,
19 because for us to prevail in this case on a preliminary
20 injunction where plaintiffs have the burden of proof, we need
21 not show that the defenses of the other arguments that
22 plaintiffs would like for the Department of Justice to make
23 would have been or would not have been bound.

24 The question is whether the Acting Secretary's
25 determination of litigation risk was arbitrary and capricious.

1 And it can't be arbitrary and capricious to defer to a Fifth
2 Circuit opinion.

3 **THE COURT:** But you say it was a determination of
4 litigation risk. Isn't that a recharacterization? He flat-out
5 said it was illegal. That's what the Attorney General said.
6 He didn't say "litigation risk." He said, *In my opinion, this*
7 *is illegal.* All right. We all have to respect the
8 Attorney General. And I do respect the Attorney General.

9 But nevertheless, if a District Judge, and the Court of
10 Appeals, and the Supreme -- they may say he's wrong on that; he
11 did have the authority. Isn't that a -- that's a legal issue.

12 **MR. ROSENBERG:** So he said -- he actually said both;
13 but I think you have to look at the statement in context.

14 So if we look at the Attorney Generals' letter to
15 Acting Secretary Duke, which is at AR 251 --

16 **THE COURT:** Okay. All right. Where is that?

17 **MR. ROSENBERG:** Let me know when you're there.

18 Okay. Second paragraph. I'll read from the beginning to
19 the end, because I think the context of this paragraph is
20 important. The Attorney General starts off by saying, *DACA was*
21 *effectuated by the previous Administration through executive*
22 *action without proper statutory authority, and with no*
23 *established end date, after Congress' repeated rejection of*
24 *proposed legislation that would have accomplished a similar*
25 *result. Such an open-ended circumvention of immigration laws*

1 was an unconstitutional exercise of authority by the
2 Executive Branch. So that set of sentences goes to the
3 legality issue.

4 But then you get to the bottom of the paragraph; that
5 conclusory section of the paragraph that starts with the word
6 "Because." And it says, *Because the DACA policy has the same*
7 *legal and constitutional defects that the courts recognized as*
8 *to DAPA, it is likely that potentially imminent litigation*
9 *would yield similar results with respect to DACA.*

10 So that's the litigation risk. And I think that they do
11 have to be read together, although at the same time, litigation
12 risk, by itself, would provide a valid basis for the
13 rescission.

14 Judges sometimes make mistakes. I mean, we hope this that
15 Court won't, but judges sometimes make mistakes. And let's
16 assume, for example, that this Court believes that DACA is
17 lawful. That's neither here nor there, because a different
18 District Court Judge in Texas had issued an opinion as to DAPA
19 and expanded DACA that went the other way. And based on that
20 as well as the Fifth Circuit's decision, it is certainly
21 reasonable to conclude that there is a substantial litigation
22 risk, which is reflected in the Acting Secretary's memo.

23 So even if it were legal --

24 **THE COURT:** That's what I'm asking you.

25 This is one sentence; one sentence in something that is

1 much more complicated in trying to predict whether or not that
2 Judge really would have enjoined on a nationwide basis the DACA
3 program, without considering the kind of things that you, as a
4 good lawyer -- and every good lawyer here -- would have had
5 page after page of analysis. And instead, there's a cryptic
6 one-sentence thing there.

7 Is that -- is that --

8 Now, if we're in the realm of arbitrary and capricious,
9 and it's reviewable, don't we insist on more than that
10 conclusory statement?

11 **MR. ROSENBERG:** I don't think that there's much more
12 than that that needs to be said.

13 Plaintiffs have criticized the Government for the
14 Administrative Record. And this Court, obviously, has opined
15 on that. But the Administrative Record, as a whole, reflects a
16 litigation-risk analysis.

17 These were the documents that the Acting Secretary
18 considered -- came from her DACA file -- when she was
19 considering what to do with the policy. And they consist of,
20 you know, some documents that candidly are helpful to
21 plaintiffs.

22 And I know early on this Court indicated that the
23 Administrative Record should include unhelpful documents, from
24 the Government's perspective. We included those documents; the
25 OLC memo, which, in a footnote, noted that they gave

1 preliminary oral advice.

2 But the fact is the Record also includes the preliminary
3 injunction opinion by the District Court Judge; the Fifth
4 Circuit's opinion; and the Supreme Court's affirmance on a 4-4
5 split. That is, in essence, a component of a litigation-risk
6 analysis.

7 But even if you set aside litigation risk for a moment,
8 you can also independently look at the Attorney General's
9 statement, because it's clear that the Attorney General does
10 believe that DACA is unlawful.

11 And if that's the case, that raises questions as to how
12 would the DACA lawsuit be defended in the Southern District of
13 Texas, because it's the Department of Justice's obligation to
14 defend lawful statutes and lawful policies.

15 But you know, it's difficult to predict-- and that's why
16 this is a rabbit hole -- what arguments we would have been able
17 to make, if we would have been able to make arguments, at all,
18 in defense of a policy that the Government had concluded, based
19 on a Fifth Circuit opinion -- a binding Fifth Circuit
20 opinion -- is unlawful.

21 And so where does that get plaintiffs, if we wound up
22 litigating the *Texas* case, and weren't able to present valid
23 defenses because of the illegality of DACA as it was
24 administered? And then the District Court enters an injunction
25 that winds down the program very, very quickly.

1 **THE COURT:** Well, but there's nothing in our
2 Administrative Record that addresses the laches point. Right?

3 **MR. ROSENBERG:** Well, that's a point that plaintiffs
4 made up.

5 **THE COURT:** No. I didn't even get it from them. I
6 thought of it, myself. The first time I read this I said that
7 the DAPA program was fresh off the books, and the DACA had been
8 there for five years. And where were these plaintiffs all of
9 the time, letting the program get started, when so many people
10 rely on it?

11 **MR. ROSENBERG:** So let me -- let me --

12 You know, for the last few minutes there's a big-picture
13 point that I've very much wanted to make. And I think that
14 that goes to the laches argument. I'll address laches very
15 briefly, but I'd like to -- I think the Court does need to take
16 a step back, and look at what this policy's fundamentally
17 about.

18 Regarding laches, we think that there is -- was a change
19 of circumstance; that, you know, obviously, plaintiffs in Texas
20 were seeking prospective equitable relief. So it's unclear to
21 the extent to which laches would apply in that context.

22 And certainly if the District Court Judge in Texas had
23 found that DACA was unlawful, there would be no justification
24 that would require the Government to continue that policy.

25 Under any circumstance of continued litigation, it is

1 likely if not virtually certain that DACA would have been wound
2 down much more quickly, whether it be through a preliminary
3 injunction, early summary judgment, or a judgment on the merits
4 based on binding Fifth Circuit precedent, than the orderly
5 wind-down that the Acting Secretary provided for the DACA
6 rescission.

7 But to speculate on hypothetical arguments that plaintiffs
8 believe that the Government should have made, I think, really
9 does place this Court -- and has this Court go down a rabbit
10 hole that's inappropriate.

11 But I do think -- and this is --

12 **THE COURT:** You --

13 Look. The new Administration has regularly taken appeals.

14 The District Judges have ruled against you in other kinds
15 of cases, like the travel ban, and so forth. And you haven't
16 rolled over when that has happened. You've gone to the Court
17 of Appeals, and you've gone to the Supreme Court, and you
18 vigorously have litigated those issues.

19 **MR. ROSENBERG:** And we did so here. And we lost in
20 front of the Fifth Circuit, and we lost in the front of the
21 Supreme Court.

22 **THE COURT:** But you didn't lose on DACA. You lost on
23 DAPA.

24 **MR. ROSENBERG:** But we lost on expanded DACA, which
25 was enjoined. And we also -- and we also --

1 And plaintiffs have never pointed out a matter in which
2 DACA could be distinguished from --

3 **THE COURT:** Yeah. I'm pointing one out. Laches, for
4 starters.

5 **MR. ROSENBERG:** Well, that's -- that's a defense.

6 That is not a way to distinguish the underlying policy,
7 Your Honor.

8 And that also still doesn't address the fact that there
9 was a change in circumstances; that Texas had very favorable
10 opinion from the Fifth Circuit that would have justified their
11 amendment to the Complaint.

12 And the fact that they were seeking only prospective
13 relief, I think, means that the equitable doctrine of laches
14 wouldn't apply.

15 I'm not sure. I'm not sure, actually. I'm not aware of
16 case law regarding the application of laches in the context of
17 the APA versus, you know, statute of limitations.

18 And certainly Texas' argument probably would have been
19 that the harms associated with the DACA policy as it was being
20 administered would continue to accrue to the state, which might
21 undercut any laches argument, because they are suffering a
22 continuing harm; or at least, that's what they would likely
23 say.

24 But I do want to take a step back -- and this does relate
25 to the laches argument, as well -- because I don't think that

1 laches would apply in the context of the individuals here. And
2 this goes back to probably the fundamental disagreement between
3 the parties about this case. And the reason why we're here is
4 we have very different conceptions of what DACA was about.

5 And I think how this Court views DACA is likely to have
6 substantial impact on whether it agrees that plaintiffs have
7 failed to state a claim, and whether it agrees that plaintiffs
8 are unlikely to succeed on the merits.

9 And it's important to remember that DACA --

10 You know, plaintiffs come up here -- our friends -- and
11 they say, you know, this is a program that conferred rights;
12 that individuals relied upon their DACA grants; that they
13 benefited from these DACA grants.

14 But it's important to remember that when President Obama
15 created the DACA policy --

16 He didn't create it. The Secretary of DHS did.

17 But when President Obama spoke to reporters on DACA, he
18 said -- and I'm going to read. This is from the appendix that
19 plaintiffs have submitted to the Court. It's Exhibit Q to the
20 very long declaration. And it appears on their appendix at
21 pages 1,739 to 1,740.

22 He said, *Now let's be clear. This is not amnesty. This*
23 *is not immunity. This is not a path to citizenship.*

24 This is the important part.

25 *It's not a permanent fix. This a temporary, stopgap*

1 measure that lets us focus our resources wisely, while giving a
2 degree of relief and hope to talented, driven, and patriotic
3 young people.

4 So when this policy was created --

5 **THE COURT:** And that's the way I view it; exactly
6 what you just read.

7 So you -- but nevertheless, it -- it gives people who
8 otherwise wouldn't be able to work in the legitimate economy --
9 it gives them a work permit, and allows them to be
10 contributing, taxpaying members of the economy, as opposed to
11 doing something, you know, that might be illegal, or not report
12 their taxes. And I don't know why you wouldn't have taken that
13 into account.

14 That's -- isn't that a huge thing to have?

15 **MR. ROSENBERG:** So --

16 **THE COURT:** To have so many people being a legitimate
17 part of the economy?

18 **MR. ROSENBERG:** So let's talk about, though, while
19 that may be a policy rationale that this Court believes is
20 valid, the underlying question is: What is the nature of the
21 policy, itself? What was it intended to do?

22 From the moment that the policy was created, according to
23 President Obama, it was not intended to be a permanent fix.

24 **THE COURT:** Correct.

25 **MR. ROSENBERG:** So when plaintiffs come here and they

1 say there are individuals who'll have their DACA status taken
2 away from them, and that they're relying upon that status -- it
3 was never intended to be permanent.

4 And, in fact, their status isn't being taken away from
5 them, because every DACA recipient will continue to enjoy the
6 benefits of DACA through the end of their two-year term,
7 whenever it may end after March 5th.

8 But indeed when you look at President Obama's statement
9 about the creation of DACA, and then you compare it to the
10 statement issued by Acting Secretary Duke at the rescission of
11 DACA, it shows, if anything, that the rescission was entirely
12 consistent with the original purpose of DACA.

13 And so this is also in plaintiffs' appendix. It's
14 Exhibit DD at ECF Number 121-2. And this is a statement that
15 the Acting Secretary issued contemporaneously with the
16 rescission of DACA. And she notes, as she does in the
17 rescission memo, that the Government was faced with two
18 options: Wind the program down in an orderly fashion that
19 protects beneficiaries in the near term, while working with
20 Congress to pass legislation; or allow the Judiciary to
21 potentially shut down the program completely and immediately.

22 So, just like President Obama, who noted that DACA was
23 intended only to be a temporary fix while Congress works on a
24 congressional fix, because that's where the protection for
25 individual DACA recipients ultimately has to come from -- it

1 has to come from Congress. And those policy decisions that the
2 Court is contemplating are policy decisions that Congress has
3 to weigh. And that's something that's fundamental to the
4 nature of -- of, you know, the type of relief that plaintiffs
5 are -- are seeking here.

6 And so the Acting Secretary says that DACA was never more
7 than deferred action of bureaucratic delay that never promised
8 the rights of citizenship or legal status in the country. The
9 program did not grant recipients a future. It was, instead,
10 only a temporary delay until a day of likely expiration.

11 Again, that is entirely consistent with President Obama's
12 statement regarding creation of this policy.

13 So perhaps it's worthwhile for Congress to consider the
14 benefits of providing some form of relief to these individuals.
15 Perhaps congressional relief might relieve this Court of some
16 of its obligations in this current lawsuit; but at the end of
17 the day, the rescission of DACA was entirely consistent with
18 the creation of DACA.

19 And so when we discuss issues like the individual DACA
20 recipients, who have alleged that they will be harmed through
21 the rescission of the policy, and the steps that they've taken,
22 they would say, in reliance upon that policy, it was never
23 intended, from Day One, to provide the type of relief that
24 plaintiffs would ascribe to it.

25 And as the Court reviews the APA claims, the Equal

1 Protection claims, the Due Process claims, and the equitable
2 estoppel claims, it needs to look to how the policy was
3 originally intended to be when it was created just five short
4 years ago.

5 **THE COURT:** All right. All right. What does the
6 other side say? What do you say to the point that --

7 Okay. Assume for the sake of argument that everyone will
8 now agree that it was perfectly lawful to have the DACA
9 program. Nevertheless, Counsel makes the point that the
10 Attorney General thought there was a significant litigation
11 risk that the Judge in Texas might have allowed the amendment;
12 might have overruled laches; it might have enjoined the DACA
13 program on a stop-it-right-now basis; and that discretion was
14 the better part of valor. And so let's just phase out the DACA
15 program now, rather than litigate it. So -- and the Government
16 does that all of the time. They decide whether to fight, or
17 fold their tent. And this is just another one of those
18 decisions to cut their losses.

19 So what do you say to that point?

20 **MR. DAVIDSON:** I would say the Government gets sued
21 all of the time; and for that reason, the Courts in this
22 Circuit have on multiple occasions rejected
23 litigation-risk-type rationales.

24 We cited the *Organized Village of Kake* case in our brief.
25 That's a Ninth Circuit case.

1 **THE COURT:** How can that be? How can that be, that
2 litigation risk is not a legitimate factor? Tell me about that
3 decision. I'm unaware of that decision.

4 **MR. DAVIDSON:** That's a case involved something
5 called the "Roadless Rule," which was a regulation having to do
6 with whether you could put roads in roadless areas of National
7 Parks.

8 **THE COURT:** What was the name of the decision?

9 **MR. DAVIDSON:** It was called *Organized Village of*
10 *Kake versus USDA*. It's 795 Fed. 3d. 956. And the portion we
11 cite in our brief is page 970. That's a 2015 opinion of the
12 Ninth Circuit.

13 **THE COURT:** Read that to me, please.

14 **MR. DAVIDSON:** So the quotation I have is the
15 Department of Agriculture asserted that, quote, "Litigation
16 over the last two years," unquote, related to the Roadless Rule
17 justified a reversal of their policy. And what the
18 Ninth Circuit said was it rejected that rationale, and said,
19 quote, "At most, the Department deliberately traded one lawsuit
20 for another," unquote. So the Ninth Circuit was not persuaded
21 by litigation-risk rationale that didn't address the merits of
22 the decision.

23 I would also say I want to be precise about what the
24 litigation risk at issue is. The Government in this case has
25 said that the litigation risk was an abrupt, imminent,

1 nationwide injunction. That was what they were worried about,
2 and so they were really doing DACA recipients a favor, by
3 winding down the program in the way that they did.

4 There is nothing the record, whatsoever, suggesting that
5 there would be an immediate and abrupt nationwide injunction.

6 The letter they rely on from the Texas Attorney General,
7 which is at Administrative Record 239, does not threaten an
8 injunction. It does not say anything about seeking an imminent
9 nationwide injunction. In fact, it requested a phase-out of
10 the DACA program. And it said explicitly that this request,
11 quote, "does not require the Executive Branch to immediately
12 rescind DACA, or expand DACA permits that have already been
13 issued," unquote.

14 So the Texas Attorney General is not threatening an
15 immediate, abrupt, nationwide injunction. And it's hard to
16 imagine any court of equity anywhere in the United States
17 ordering a stop to DACA more abrupt than the rescission
18 memorandum, itself.

19 Now, in addition to the points that the Court has already
20 made --

21 **THE COURT:** Well, but let's say that that's right,
22 for a moment. The Government's position is that they have to
23 have the authority to manage litigation, and decide what is the
24 best way to get through the thicket of lawsuits. And so they
25 make -- let's assume they make a decision in good faith. And

1 it's not the decision that you would have made, but it's the
2 decision that they make. Don't we have to accept that, as long
3 as it's rational, and even if we disagree with it?

4 I've got to read this can't-trade-one-lawsuit-for-the-
5 other thing. That's a good line, by the way. I like that.
6 But it cuts completely contrary to the idea that the Government
7 gets to manage its litigation docket.

8 **MR. DAVIDSON:** The Government can consider litigation
9 risk.

10 What it can't do is make an arbitrary and capricious
11 decision in the context of the overall decision. It can't
12 ignore all of the other factors, and focus exclusively on
13 litigation risk.

14 That's why it's a very dangerous argument that the
15 Government is making. They get to sued all the time over
16 everything. And if they were allowed to simply say, *All right.*
17 *We're going to surrender on lawsuits that challenge policies*
18 *that we don't like*, then that gets rid of the APA. There's no
19 review, then, on the policy merits, which is what the
20 Government is supposed to consider.

21 I'd also like to suggest that the litigation risk that's
22 being presented in this courtroom is completely overblown. So
23 even if you look at the Fifth Circuit, itself, there were four
24 Judges on the Fifth Circuit who looked at the DAPA program,
25 because there was a Stay Motion, and there was a Preliminary

1 Injunction Motion.

2 Two judges were in the majority both times, and said that
3 DAPA was unlawful.

4 There were two different dissenters. So even on the Fifth
5 Circuit, itself, it's a 2-2 split.

6 Moreover, there was a decision in the Fifth Circuit called
7 the *Crane versus Johnson* case, 783 Fed. 3d. 244, looking at the
8 DACA program, and considered a challenge by DHS agents who said
9 that they shouldn't be required to grant DACA permits. And in
10 that case -- the *Crane* case -- there were three Judges,
11 including one of the dissenters from *United States versus*
12 *Texas*, who found that the DACA program was discretionary, and
13 was case by case. It made different determinations and
14 different findings from what the DAPA Court had done.

15 So if the Government were reading the tea leaves in any
16 kind of rational way, in the Fifth Circuit, it would have had
17 to consider the that there was a 2-2 split, even on the DAPA
18 program. It would have had to consider this *Crane* case. And
19 there's no evidence that they considered any of that.

20 I'd also say that on a formal level, the DACA program is
21 different from DAPA, and involves a different population of
22 people. And so DAPA was not binding. It was not a forgone
23 conclusion that DACA would go the way of the Fifth Circuit, you
24 know, the same way as the DAPA policy did. And there's a
25 really important distinction between the two.

1 So DAPA involved a population of immigrants who had an
2 alternative pathway to lawful permanent residence. So because
3 it was parents of people who were already lawful permanent
4 residents, there was a pathway to citizenship in the INA.

5 Now, it was a long pathway and an impractical pathway, but
6 the Fifth Circuit said that because Congress had set forth the
7 pathway in the INA, itself, that that created a problem for
8 DAPA, because it was potentially in conflict with what Congress
9 had done.

10 That is not true for DACA. The DACA population does not
11 have an alternative pathway, as a group, to lawful status.
12 Indeed, it's a requirement of the DACA program that you not
13 have that.

14 So the cases are legally distinguishable, and they're
15 factually distinguishable.

16 The DAPA program involved provisional fact-finding at the
17 preliminary-injunction stage. And in a subsequent theoretical
18 DACA lawsuit, if it had happened, if it had overcome the laches
19 bar, if the State Attorneys General had actually asked for some
20 kind of an injunction, the District Court would have been free
21 to make different fact findings on a completely different
22 record.

23 And so the litigation-risk analysis -- in order for the
24 Government to be able to rely on the litigation-risk analysis,
25 it needs to be a rational one. It needs to consider the

1 relevant factors. And I think the most important factor is
2 this. It's litigation risk.

3 There are some risks that are worth taking. And I would
4 submit to the Court that for the Federal Government of the
5 United States to risk some kind of litigation, there could be
6 no better reason than to try to preserve the protections for
7 these 700,000 people. Any litigation risks that they might
8 have confronted needs to be weighed against the interests that
9 are on the other side of the ledger, including, for example,
10 200,000 U.S.-citizen children who face the loss of their
11 parents.

12 So this sterile term, "litigation risk," as a
13 get-out-of-jail-free card to allow the Government to rescind
14 any policy that it wants, is just a way to get out of
15 considering the policy merits that they're required to consider
16 under the APA.

17 And I think this segues me into another point that I'd
18 like to address, which is the pretextual character of the
19 Government's rationale in this case. We've asked in our
20 briefing for a finding that the Government's stated rationale
21 for the rescission is a pretextual rationale. It's not the
22 real rationale.

23 Now, the Government doesn't come out and announce when
24 it's acting pretextually, so we have to build a case with
25 evidence and a series of points, which we have done.

1 The first justification for why the Government's decision
2 is pretextual is their total failure to consider any
3 alternatives that might have mitigated the litigation risk. So
4 if you assume that some litigation risk existed, could that
5 have been mitigated possibly by getting rid of the checklist;
6 possibly by moving the DACA determinations to the Field
7 Offices?

8 The Government never considered those, at all. And the
9 failure to consider those gives rise to an inference that the
10 litigation-risk rationale is pretextual.

11 There's also a shifting explanation in the Record. The
12 Attorney General asserted a legality rationale. He asserted
13 that DACA was illegal; an unconstitutional exercise of the
14 Executive Branch's powers.

15 The Government is not asserting illegality in this
16 litigation. They've pivoted to a litigation-risk rationale.
17 And I would note that that litigation-risk rationale is nowhere
18 to be found in the rescission memorandum, itself. It's never
19 articulated as such. And so we've seen shifting positions from
20 the Government, which gives rise to the inference that its
21 stated positions are not the real ones.

22 I would add that the President, himself, tweeted the day
23 of the rescission -- and that is at our appendix, 1,958 -- that
24 if Congress doesn't do something, he would revisit the policy.

25 Well, if the litigation risks were so severe, if it was a

1 losing cause that, as the Government says, would be quixotic to
2 oppose, what is the President doing revisiting the issue?

3 That suggests that the Government is acting pretextually.

4 The Attorney General, when he gave his press conference on
5 the day of the rescission, gave totally different rationales
6 for the rescission, beyond litigation risk. He talked about
7 the surge of minors at the border. He talked about jobs for
8 American citizens. He talked about crime. He talked about
9 terrorism.

10 There's no -- nothing in the Record, at all, supporting
11 those considerations or articulating those considerations, yet
12 clearly they were on the mind of the Attorney General. That
13 gives rise to the inference that litigation risk is a pretext.

14 And I would also say that the Government didn't
15 immediately terminate the program that they thought created
16 untenable litigation risk. They kept it in place for a while,
17 and phased it out.

18 Well, if it created intolerable litigation risks or was
19 illegal, why would they do that?

20 Finally, I would say that the Government has asserted in
21 this case a variety of defenses and a variety of positions
22 that, if they were accepted, would have -- would have reduced
23 to a minimum any litigation risk from the *Texas* case. So in
24 the *Texas* case, they said that deferred action programs weren't
25 justiciable under the APA.

1 Well, doesn't that diminish the litigation risk?

2 They said that there was a jurisdictional bar to
3 consideration, based on Section 1252(g) of the INA.

4 Doesn't that reduce the litigation risk?

5 They say in this case that notice and comment was not
6 needed. That's different from what the *Texas* Court held.

7 And they say that DACA was an exercise of prosecutorial
8 discretion. They say that on page 1 of their opposition to our
9 Motion for Provisional Relief. That makes it presumptively
10 lawful.

11 Doesn't that decrease litigation risk?

12 They have standing defenses.

13 Wouldn't those have decreased the litigation risk?

14 So how is it possible that there could have been
15 intolerable litigation risk in the Fifth Circuit, in Texas,
16 when they had all of those defenses available to them?

17 All of this, taken together, suggests that the stated
18 rationale -- this litigation-risk rationale -- is a pretext;
19 that there's something else going on; that there's an unstated
20 reason for what the Government did.

21 And so we would request that this Court make a factual
22 finding that pretext has been shown; at least, the likelihood
23 of success on that point.

24 And because the Government is not allowed to act on the
25 basis of pretext, that is, alone, a reason for setting aside

1 the rescission memorandum.

2 **THE COURT:** All right. What does the Government say
3 to that?

4 **MR. ROSENBERG:** There are a lot of specific points
5 I'd like to respond to.

6 I'd like to start with the *Crane* decision, which
7 plaintiffs cited at the beginning of their colloquy. The *Crane*
8 decision was an appeal of a grant of a Motion to Dismiss for
9 lack of subject-matter jurisdiction, and so I don't believe
10 that the substance of DACA was before the Court. It was a
11 jurisdictional issue.

12 Regarding the Judges on the Fifth Circuit, plaintiffs have
13 noted that there were two Judges out of the four who would have
14 approved DACA. They were both in the dissent in both opinions.
15 And I'm not an appellate lawyer, but I believe --

16 **THE COURT:** Did you say "DAPA" or "DACA"?

17 **MR. ROSENBERG:** I'm sorry. You're correct. Expanded
18 DACA, and DAPA.

19 But I believe that the Fifth Circuit actually has pretty
20 strict rules regarding the precedential nature of its
21 decisions.

22 Regarding the *Organized Village of Kake versus USDA*, on
23 page 970, that case is distinguishable. That involved a
24 situation with a National Forest, where exceptions were being
25 made for that National Forest, and the litigation impacts in

1 other National Forests.

2 And in that case, reading from the page that plaintiffs
3 have summarized, the Court states that, *Alaska candidly*
4 *conceded in its Opening Brief that the Tongass Extension*, which
5 is for that particular National Forest, *obviously will not*
6 *remove all uncertainty about the validity of the Roadless Rule*

7 --

8 (Reporter requests clarification.)

9 **MR. ROSENBERG:** -- *about the validity of the Roadless*
10 *Rule, as it is the subject of a nationwide dispute and*
11 *nationwide injunctions*, unquote.

12 These other lawsuits involved forests other than the
13 Tongass; completely different situations. So it's impossible
14 to discern how an exemption for the Alaska forest which was at
15 issue in that case would affect them.

16 And the Department could not have rationally expected that
17 the Tongass exemption, which, again, was subject to that -- the
18 litigation here -- would even have brought certainty to
19 litigation about that particular forest.

20 Here, by contrast, we have a situation that's directly --

21 **THE COURT:** What were you saying about the
22 trade-one-lawsuit-for-another thing? Isn't that the same case?

23 **MR. ROSENBERG:** I believe that is the same case, but
24 it's factually distinguishable, because there were multiple
25 lawsuits, as I understand it, involving, you know, different

1 forests.

2 And, you know, unlike here, where you have a lawsuit about
3 a set of policies that are closely tied together, there, you
4 have, you know, different factual circumstances giving rise to
5 different lawsuits, again, based on my review of the case right
6 now.

7 The Court, of course, is welcome to review that lawsuit --
8 that case. That is a case that plaintiffs have cited in their
9 brief.

10 I do want to address the arguments that plaintiffs have
11 again made regarding the defenses that the Government could
12 have made. And in hearing plaintiff's argument, again, I think
13 this is a rabbit hole, but it's become clear that the reason
14 that this is a rabbit hole is what this has now become is a
15 challenge to the Department of Justice's litigation judgment.
16 That's what this really is, at its core.

17 When plaintiffs say the Department of Justice could have
18 presented this defense or could have presented this argument,
19 they are now challenging the Department of Justice's litigation
20 decisions. And that is a remarkable position. It would create
21 litigation on litigation, if this Court were to hold that that
22 is a valid -- that is a valid basis for a claim, because every
23 time that the Department of Justice makes a litigation
24 decision, and the Department of Justice, as the Court is aware,
25 has the responsibility for defending the interests of the

1 United States, and those litigation decisions may be decision s
2 in particular litigation matters. It may be decisions to
3 refrain from litigation. It may be decisions about the context
4 of a particular litigation.

5 Is that going to be subject to some sort of challenge,
6 where a plaintiff can say, *Well, the Department of Justice*
7 *should have made this argument that we have thought of; and*
8 *because it didn't or it chose not to, that gives rise to some*
9 *sort of claim.* Because that's really what plaintiffs are
10 saying here. And that's, I think, a remarkable position for
11 plaintiffs to take.

12 Plaintiffs state that the -- they have had argued pretext.
13 And they have stated that the litigation risk was not in the
14 Acting Secretary's decision.

15 I believe this is something that we addressed at the last
16 hearing when I was here, regarding the scope of the
17 Administrative Record.

18 And if the Court turns to page AR 254, which is the
19 rescission memo, as well as AR 255, looking at the last
20 paragraph on page 254 and the first paragraph on page 255, I
21 won't read it here, but these were the key paragraphs of the
22 rescission memo.

23 The Acting Secretary of DHS refers to the Attorney
24 General's letter. And, as we discussed previously, the
25 Attorneys Generals' letter to DHS noted both the legal

1 infirmity of DACA, as well as the litigation risk.

2 And then, under the heading "Rescission of the June 15th
3 2012 DACA Memorandum" at the top of page 255, the Acting
4 Secretary says, *Taking into consideration the Supreme Court's*
5 *and the Fifth Circuit's rulings in the ongoing litigation, and*
6 *the September 4th, 2017, letter from the Attorney General, it*
7 *is clear that the June 15th, 2012, DACA program should be*
8 *terminated.*

9 She's referencing the -- the adverse decisions that have
10 been handed down against the Government in a materially
11 identical program in a manner that was binding on the
12 Government. That is litigation risk. That is also legality.

13 The Government has been consistent about its position. It
14 was the same position that I explained to the Court when I was
15 here last, regarding the scope of the Administrative Record.

16 And so there's no basis for pretext here. There's no
17 confusion regarding this.

18 This policy was rescinded for the two reasons that are
19 stated in the Attorney General's letter and the Acting
20 Secretary's memo. And those reasons are pretty
21 straightforward.

22 Regarding the presidential statements that plaintiffs rely
23 upon, you know, the President obviously was not the decision
24 maker here.

25 And, you know, in terms of references to revisiting the

1 policy, that doesn't mean that the President had an opinion one
2 way or another about the legality of DACA. In fact, you know,
3 the Government has determined that DACA, as it was
4 administered, was unlawful.

5 But indeed, based on, at least, press reports that I've
6 read last night and this morning, there have been discussions
7 about trying to find a Congressional fix to DACA; the DACA
8 situation.

9 You know, parties can be optimistic that there would be
10 such a congressional fix; but again, that is entirely
11 consistent with the Acting Secretary's rescission memo about
12 how Congress needs to step in and weigh these policy issues
13 that the Court has identified. And that's also consistent with
14 President Obama's statement regarding DACA.

15 And, indeed, regarding the various policy judgments that
16 plaintiffs would have this Court make, tellingly, they have not
17 tied a single one of them to the operative statute that's at
18 issue here, which is the INA.

19 Finally, plaintiffs have -- you know, after I said that
20 plaintiffs have tended to criticize the Government for an
21 orderly wind-down of DACA, now plaintiffs have raised the
22 argument, *Well, if it's illegal, how could there be an orderly*
23 *wind-down?*

24 As a threshold matter, and very colloquially, this is a
25 no-good-deed-goes-unpunished argument.

1 But beyond that, you know, that is, in fact, an exercise
2 of prosecutorial discretion. The Acting Secretary was
3 confronted with a situation where the Attorney General had
4 determined that DACA was unlawful as it was administered; that
5 the Texas Attorney General had threatened to bring a lawsuit.

6 And so, unlike the DACA policy that had existed, with
7 continuing renewals, the Acting Secretary exercised discretion
8 to say, you know, *For those individuals who are current*
9 *recipients, because of the circumstances that we find ourselves*
10 *in where we need an orderly wind-down of the policy, we can,*
11 *you know, allow this policy to wind down in a structured*
12 *manner.*

13 That's discretion.

14 That's also a one-time use of that discretion, which is
15 part of the problem that was found with the original DACA
16 policy. So there's nothing improper about that. And so in
17 that sense, as well, you know, this policy of winding down DACA
18 reflects the discretion exercised by the Acting Secretary.

19 And going back to the Court's original questions about
20 what happens to DACA recipients after the wind-down, deferred
21 action on a discretionary basis does still remain available for
22 individuals.

23 **THE COURT:** All right. We need to take a break, but
24 let me ask for your advice on -- I could give you about another
25 half hour after a break, if you want it; but we've been going

1 now for more than three hours, and there's no way we can cover
2 every point made in your briefs. So do the lawyers wish to
3 come back to say whatever else you want to say, in about 20
4 minutes; or do you want to bring it to an end now? What's your
5 view?

6 **MR. DAVIDSON:** I think from the perspective of the
7 Motion for Provisional Relief, I think we've said what we have
8 to say.

9 There are the constitutional things which my colleagues
10 were planning on addressing.

11 **MR. ROSENBAUM:** We would like to be heard on those
12 claims, Your Honor.

13 **THE COURT:** Okay. We'll come back, but it will be
14 brief.

15 And we're done with the provisional relief.

16 We'll just focus on -- what is it? -- Due Process. Equal
17 Protection.

18 **MR. ROSENBAUM:** That's correct, Your Honor.

19 **THE COURT:** All right. Each side will get about 10
20 minutes.

21 **MR. ROSENBERG:** Your Honor, in terms of provisional
22 relief, though, we do need to address irreparable harm. We do
23 not believe plaintiffs made a showing of irreparable harm.

24 **THE COURT:** You continue on that. You can use your
25 10 minutes on that, but we're going to bring it to -- we can't

1 cover everything. So we've been going three hours. Each side
2 will get about 10 minutes.

3 All right. 15-minute break. Thank you.

4 (Recess taken from 11:10 a.m. until 11:28 a.m.)

5 **THE COURT:** What we'll do is go through the
6 constitutional arguments. I really can only give each side
7 about 10 minutes. And you can use it any way you want. You
8 can go back to irreparable injury, if you wish; but let's mere
9 about the constitutional issues.

10 **MR. ROSENBAUM:** Good morning, Your Honor.

11 Mr. Dettmer will be covering the Equal Protection and estoppel
12 arguments. I'm going to move quickly through the Due Process
13 arguments.

14 I'm pleased, obviously, to answer any questions the Court
15 has. I will supply the Clerk with case cites that I utilize
16 along the way, for the Court's convenience.

17 I want to touch on three important points with respect to
18 the Due Process -- the substantive Due Process argument here.
19 And I specifically want to cover some of the points that you
20 had some of the conversations you had with counsel in the
21 earlier part of the argument.

22 First, DACA violates the Due Process -- the rescission of
23 DACA violates the Due Process Clause in two distinct ways.

24 First, the DACA program, itself, as set out in the 2012
25 Napolitano memorandum, emancipated a discrete group of young

1 persons who had entered the United States, as children.

2 By virtue of the *Zadvydas* case, for example, at page 690,
3 the emancipation that took place, the liberation that took
4 place, removed any threat of arrest, detention, or removal, by
5 virtue of illegal entry, and afforded these young people
6 renewable protections that, in exchange --

7 **THE COURT:** How can you say that? Because the
8 documents said flat-out there were no rights conferred, and in
9 addition reserved the right, even for people enrolled in DACA,
10 to decide to go ahead and deport them.

11 **MR. ROSENBAUM:** That is the essence of our argument,
12 Your Honor. And let me explain why.

13 The memorandum, itself, said it would not confer legal
14 status.

15 That's not contested.

16 Would not create a pathway for citizenship.

17 That is not contested.

18 It did not create a right within the context of a right --
19 a legislation that Congress passed. Counsel is exactly right.
20 That's what the Obama statement was. And that was what the
21 process was -- described.

22 But the methodology and the substance of what was created,
23 itself -- the emancipation of individuals so that they would
24 not be prosecuted by virtue of illegal entry; the fact that
25 individual autonomy was created so that, as Your Honor stated

1 this morning, individuals could apply for work; they could
2 pursue their lives with respect to any trade, profession, or
3 job; they could pursue a higher education; they could pursue
4 any sort of education to meet their dream; that they could, in
5 fact, raise a family, raise children, have children raise
6 children, without fear of governmental -- without fear of
7 governmental intervention with respect to enforcement.

8 That creates, under the *Morrissey* case, under all sorts of
9 cases --

10 **THE COURT:** I'm sorry. Which case?

11 **MR. ROSENBAUM:** *Morrissey versus Brewer*, at page 48;
12 the *Obergefell* case, at page 2,597 to 2,5999, and page 2,601 --
13 those are basic liberty interests. The *Zadvydas* case, at 690,
14 refers to these as "central"; as the central, core interests
15 under the liberty clause.

16 And no statements by any executive member -- member of the
17 Executive Branch can construe what are liberty created
18 interests.

19 What the Chief Justice, Chief Justice Roberts, stated at
20 the *Osborne* case at page 68 -- those are state-created liberty
21 interests.

22 And, Your Honor, that disclaimer point --

23 And I want to refer to Judge Fisher's decision in the
24 *Newman* case at page 797, where the Government in that case --
25 or a party in that case -- the Government in that case said,

1 Well, these are just quasi-property interests.

2 And Judge Fisher said, No. You are not in the position --
3 the Government -- to use these boilerplate phrases to say that
4 a constitutional interest is not created.

5 Why is that?

6 It's -- again, I don't think there's any inconsistency,
7 because there was no congressional right created. The
8 congressional right that was created had to do with the pathway
9 to citizenship. And that is not contested; but it is all the
10 way back to *Roth* and *Sindermann* in 1972; the *Gauss* case; the
11 other cases that I'm describing.

12 If a liberty interest is created -- a state-created
13 liberty interest; that's Chief Justice Roberts' words, at page
14 68 of the *Osborne* case -- that is a matter for this Court or
15 the Judiciary to determine. That goes all the way back to
16 *Marbury versus Madison*.

17 **THE COURT:** Wait. Wait. Let me give you a
18 hypothetical. Let's say you don't have a program. You have
19 one person.

20 And the Government -- DHS -- brings in -- let's say it's
21 someone; an alien who comes here as a two-year-old, and is now
22 20 years old. And the Government says to that one person,
23 Listen. We're going to give you deferred action, but you got
24 to realize that we could revoke it at any time. And you ought
25 to be on your best behavior. Go get a college degree, and then

1 we'll see where we are when you get your college degree. But
2 remember, we can revoke this at any time.

3 So they go enroll in college, and do great. And then the
4 Government revokes it. Say -- whatever reason.

5 They -- you're saying there's -- that that is -- sounds
6 like you're saying that has created some kind of emancipation
7 which is constitutionally protected.

8 **MR. ROSENBAUM:** No, Your Honor.

9 What I'm saying is this. And this is what our Complaint
10 states at Allegations 33 through 47. What our Complaint says
11 was that a program was created that, in fact, said to
12 individuals, *As long as you play by the rules, the rules won't*
13 *change.* And the rules were that you pass a background check;
14 that you not commit crimes; all of the sort of matters that
15 Your Honor's extremely familiar with.

16 Under those circumstances, where, in comparison, for
17 example, to work permits, which actually have an expiration
18 date, but where, in fact, both the policy and the practice did
19 not put any termination date as to the program, itself, and
20 told individuals -- in fact, it sold itself that it would be
21 renewable.

22 Who in the their right mind would come out from the
23 shadows, if they knew that they only had two years to get it
24 done? Who would take out loans? Who would open up businesses?
25 Who would go to college? Who would raise a family, if they

1 knew it could go like that?

2 **THE COURT:** Well, maybe some would, and maybe some
3 wouldn't.

4 **MR. ROSENBAUM:** But Your Honor --

5 **THE COURT:** Maybe some would take that chance, and
6 others wouldn't.

7 **MR. ROSENBAUM:** I don't think, Your Honor, that --

8 **THE COURT:** We don't know that, for sure. Could we?

9 **MR. ROSENBAUM:** But the Complaint in this case -- and
10 we're at a Motion to Dismiss stage -- was that the Government
11 calculated that individuals would not do it, and, in fact, had
12 an aggressive campaign, an aggressive outreach campaign,
13 because they knew they had a hard sell as to this particular
14 matter that said, *As long as you play by these particular*
15 *rules, you will have the DACA status.*

16 The Napolitano memo, itself, doesn't list -- it lists all
17 of their criteria. This is page 1 of it. All the criteria.

18 And it doesn't have at the end a catchall, saying, *And, by*
19 *the way, we can take it up at our discretion, whenever we*
20 *choose, for whatever reason we choose, because you --*

21 **THE COURT:** I think it did say something pretty close
22 to that.

23 **MR. ROSENBAUM:** No, it did not, Your Honor; not
24 the -- not the Napolitano memo, itself.

25 The FAQs which Counsel talked about were taken --

1 First of all, the FAQs not are not a law.

2 Secondly, they're not regulations.

3 **THE COURT:** Well, the memo's not regulations. The
4 memo's --

5 **MR. ROSENBAUM:** No, but this is what went out in
6 terms of the defining the program, itself. It is the
7 memorandum that defines the program, itself. And none of
8 that's mentioned.

9 And the context of the FAQs, themselves, are in the
10 context of the particular rules.

11 We are prepared to show at trial, Your Honor, that the
12 understanding of the Government, itself, is precisely what I'm
13 saying; and that, in fact, there are no examples of a
14 hypothetical that Counsel raised; no examples where individuals
15 lost their DACA status for reasons that are unrelated to what
16 the criteria are, itself.

17 And we're entitled to prove that case. Those were the
18 representations made. As I said, the -- the reality was that
19 that's the way the position was sold.

20 On April 21st of this year, President Trump, who is, after
21 all, the head of the Executive -- and it's a unitary executive
22 under Article II of the Constitution. President Trump said
23 that it is the policy of the Administration that DACA
24 individuals can remain, and that, in fact, they are safe. That
25 was precisely what the policy was. In fact, the sort of

1 exceptions that Your Honor stated did not exist.

2 Moreover, this isn't the case of just one individual.
3 It's the case of hundreds of thousands of individuals who came
4 out of the shadows, with the recognition -- with the
5 understanding that they could build a life. That's the liberty
6 interest in this case. And equal dignity what Justice Kennedy
7 says at 2,597 through 2,599, and 2601. When you are able to
8 seek jobs, to go to college, to raise a family, to know that
9 law enforcement is not going to be threatening you by means of
10 physical restraint, or taking you into custody, or putting you
11 under arrest, or putting you into detention, that is the
12 essence of what liberty means. That's what the dignity,
13 itself, means.

14 Moreover, the process, itself -- and this is the Second
15 argument, Your Honor. The process, itself, is one that shocks
16 the conscience.

17 Now, I use that very advisedly. I know that there are not
18 a lot of case law on that; but if there was ever a case that
19 raised the due process issue here, this is the case.

20 At page 857 of Justice Souter's decision in the *County of*
21 *Sacramento* case, Justice Souter described for the entire Court
22 that the conscience is shocked when the actions of the
23 Government do not comport with our ideas of fair play and
24 decency.

25 What is the -- what are we alleging? And what is the

1 Record in this particular case?

2 On the same day, September 5th, that the memorandum was
3 issued, the President of the United States said, I reserve the
4 right, if Congress doesn't get it act together in six months,
5 to do that? What does that mean?

6 It means that the very reason that is being give in is
7 being undermined -- is being contradicted -- by the President,
8 himself. This is a bait and switch.

9 Come out of the shadows. Make yourself available. Give
10 intimate information which you would no way give otherwise
11 under these sorts of circumstances, with an understanding that
12 it's going to be treated securely. And then -- boom! -- all of
13 a sudden, that goes.

14 **THE COURT:** All right. Your 10 minutes is up.

15 **MR. ROSENBAUM:** One more comment, Your Honor.

16 **THE COURT:** Yes, all right.

17 **MR. ROSENBAUM:** Nine days later, the President of the
18 United States then said, We are -- this matter's in front of
19 Congress. Nothing was done. Massive border security.

20 In other words, he was saying maybe DACA can be
21 reinstated, but it has to be part of a package; which means
22 that these individuals -- these hundreds of thousands of
23 individuals -- were being used as a bargaining chip, in order
24 to get another policy through. Individuals should not be
25 treated that way. A system should not be utilized that way.

1 And that is also a separate violation of the due process
2 clause.

3 I'm prepared to deal with the disclaimer.

4 **THE COURT:** I wish we hadn't taken so much time on
5 the APA. These are all interesting points. Let's hear from --
6 who's going to argue the Equal Protection?

7 **MR. ROSENBAUM:** Mr. Dettmer.

8 **THE COURT:** Let hear about Equal Protection.

9 **MR. DETTMER:** Thank you, Your Honor. I will be very
10 brief. Ethan Dettmer, for the Garcia Plaintiffs.

11 So I'm glad we're finishing with Equal Protection, because
12 what we talked about at length this morning was: What's the
13 bigger picture here, and what are the reasons behind this
14 rescission?

15 As Your Honor knows, the Equal Protection Clause prohibits
16 singling out a single -- a particular racial group for
17 unfavorable treatment. That's what racial animus is.

18 The test --

19 **THE COURT:** Isn't there law that's in the
20 Supreme Court that, where you come to immigration, that the
21 very essence of being able to say some people from certain
22 countries are going to come in more frequently than others --
23 the alienage, I think, is the term they use -- that
24 Supreme Court, itself, has said that does not violate Equal
25 Protection? What am I thinking of?

1 **MR. DETTMER:** I don't know that case, Your Honor.

2 I do know that any Government policy cannot be based
3 on a racial classification. It may be based on the
4 classification of a country.

5 **THE COURT:** I think the Supreme Court said you can
6 discriminate in immigration, based on where -- what country
7 people come from.

8 **MR. DETTMER:** But not based on their race,
9 Your Honor.

10 **THE COURT:** Well, maybe that's right. But alienage,
11 I think, is -- in other words, what country they're from. So
12 if Congress wanted to say we will not accept anybody from a
13 part of the world that maybe they think is a dangerous part of
14 the world, I think the Supreme Court said that's okay; isn't
15 it?

16 **MR. DETTMER:** Your Honor, I think you're right that
17 if the Supreme Court said we don't want to accept people --
18 I'm sorry. If --

19 **THE COURT:** Let's say North Korea. We don't want
20 people coming from North Korea. Okay?

21 **MR. DETTMER:** I think that's probably right,
22 Your Honor.

23 **THE COURT:** Is that okay?

24 **MR. DETTMER:** But if the executive said, *We don't*
25 *want Asian people coming into the country*, that would not be

1 permissible.

2 **THE COURT:** What's your decision that says that?

3 **MR. DETTMER:** I think there are a number of --

4 **THE COURT:** Again, from an Equal Protection point of
5 view, that would be correct. If you're talking about any kind
6 of domestic policy, no question.

7 However, we're talking about immigration, which, by
8 definition, involves geographic parts of the world. So --

9 **MR. DETTMER:** Your Honor, I just --

10 **THE COURT:** I would like for you to give me a
11 Supreme Court decision that says that; that the Government
12 can't discriminate in immigration, based upon what country you
13 come from.

14 **MR. DETTMER:** That's not the argument we're making,
15 Your Honor.

16 **THE COURT:** What is your argument?

17 **MR. DETTMER:** The argument is that you can't
18 discriminate on the basis of someone's race. And that's a
19 different argument.

20 **THE COURT:** DACA applies to everybody. Why do you
21 think it's based on race?

22 **MR. DETTMER:** Well, because 93 percent of the people
23 who are DACA recipients -- this is alleged in our Complaint at
24 paragraph 120. I'm sorry. At paragraph 9, I believe.

25 93 percent of the people who are DACA holders are of

1 Hispanic -- of Latino heritage. 93 percent. In a -- in a --

2 **THE COURT:** Well, does it also apply to the other
3 7 percent?

4 In other words, is everyone --

5 Okay. That's a good point. 93 percent. But I thought
6 that rescission applied to the 100 percent; not just to the 93.

7 **MR. DETTMER:** Well, it does, Your Honor; but the
8 *Arlington Heights* case from the Supreme Court, as applied in
9 the Ninth Circuit, and the *Arce versus Douglas* case -- and
10 that's A-r-c-e -- holds that in that case, it was 80 percent of
11 the people who were affected by a particular Government policy
12 were Latino. And the Ninth Circuit said that that was enough
13 to hold that the whole policy was subject to an Equal
14 Protection challenge, based on race.

15 **THE COURT:** Well, I'll have to look at that, but you
16 know, look. We're in California. Any change in our
17 immigration policy in this country is going to
18 disproportionately affect Mexico, who's our nearest border. I
19 mean, it just stands to reason. That's our nearest border.
20 Canada, too.

21 So how do I -- how can we square that with -- your
22 argument would lead to the conclusion that every adverse --
23 everything that cuts back on immigration in this country is
24 going to be illegal.

25 **MR. DETTMER:** No, that's not the argument,

1 Your Honor. And I'm glad you asked, because -- because the
2 *Arlington Heights* case and the *Arce versus Douglas* case are the
3 two cases that give you the test that you need to apply.

4 **THE COURT:** And what is that test?

5 **MR. DETTMER:** So on page 266 of *Arlington Heights* the
6 Supreme Court said, *Determining whether invidious*
7 *discriminatory purpose was a motivating factor* --

8 And that's all that's necessary. It doesn't need to be
9 the sole factor. It only needs to be a motivating factor for
10 the policy.

11 -- *demands a sensitive inquiry into such circumstantial*
12 *and direct evidence of intent as may be available.*

13 **THE COURT:** Was that an immigration case?

14 **MR. DETTMER:** No. No, Your Honor, it wasn't. It was
15 a housing case.

16 **THE COURT:** Give me an immigration case. That
17 Ninth Circuit case -- I think you had one where you said it was
18 an immigration case. Right?

19 **MR. DETTMER:** Well, the Ninth Circuit case is not an
20 immigration case, but I think it is determinative here.

21 And let me just go a little bit further. That
22 Ninth Circuit case said -- and I'm quoting from page 977, 978
23 of Volume 793 of the Federal Reporter 3d. A *plaintiff need*
24 *provide very little such evidence of discriminatory intent to*
25 *raise a genuine issue of fact. Any indication of*

1 discriminatory motive may suffice to raise a question that can
2 only be resolved by a fact finder.

3 And, you know, I'll point out, as Your Honor notes --

4 **THE COURT:** What is our fact here? I thought this
5 was a case where the President was giving us tweets that he
6 wanted the DACA program.

7 **MR. DETTMER:** Well, he did do that, Your Honor. And
8 I think the series of cases, as the Supreme Court and the
9 Ninth Circuit say, you have to look at all of the
10 circumstances.

11 **THE COURT:** What is the circumstance you're alleging
12 in the Complaint?

13 **MR. DETTMER:** So the circumstances are many. They
14 begin. And I'll just hit the highlights, for -- in the
15 interests of time.

16 The circumstances begin with, as Your Honor knows,
17 President Trump, when he announced his campaign, said that
18 Mexico is sending rapists and killers over the border, and made
19 a number of other comments in that same vein. And these are in
20 our Complaint at paragraphs 101, 103, and 109. There were a
21 series of similar comments throughout the campaign. He
22 reaffirmed those initial comments in 2016.

23 In 2017, on August 22nd, just less than two weeks before
24 the rescission was announced, he said, in a rally in Arizona,
25 that unauthorized immigrants are, quote, "animals who bring the

1 drugs, the gangs, the cartels, the crisis of smuggling and
2 trafficking." That's at page 111 in our Complaint.

3 Three days after that he pardoned Sheriff Joe Arpaio.
4 This is, again, within days of the rescission being announced.
5 And, as you know, Sheriff Arpaio was convicted of criminal
6 contempt for harassment, intimidation -- systemic harassment
7 and intimidation of Latino people in Arizona. When he pardoned
8 him, President Trump said that Sheriff Arpaio was, quote, "An
9 American patriot who was," quote, "convicted for doing his
10 job."

11 So these comments -- if you look at the Arce case from the
12 Ninth Circuit that I mentioned earlier, which also came out of
13 Arizona, it went through the same sensitive inquiry, and
14 actually reversed a summary judgment ruling by the District
15 Court, on Equal Protection grounds.

16 The types of comments that --

17 **THE COURT:** All right. This is an immigration case
18 you're talking about now?

19 **MR. DETTMER:** No. This is the -- what the Arce case
20 was, was it was a case where there was an ethnic -- a
21 Mexican-American Studies program in the public schools.

22 **THE COURT:** It involved these same comments by the
23 President?

24 **MR. DETTMER:** Not the same. It involved, actually,
25 much more tame comments by local legislators who passed this

1 rule.

2 **THE COURT:** Oh, somebody else. All right.

3 **MR. DETTMER:** Right.

4 **THE COURT:** I thought you were saying it was a
5 President Trump case. Okay. All right.

6 **MR. DETTMER:** No. But if you read this decision,
7 Your Honor, the types of comments that the Ninth Circuit uses
8 to overrule a summary judgment ruling by the District Court are
9 much more tame than the comments that I just read to you.

10 **THE COURT:** All right. Well, okay. We've got to
11 bring it to a close here.

12 What do you say?

13 **MR. ROSENBERG:** All right. Let me start with --

14 **THE COURT:** You get -- maybe not 20 minutes. You get
15 20 minutes to say what you would like.

16 **MR. ROSENBERG:** I do want to make sure I reserve time
17 for scope of relief and irreparable harm. So I can be very
18 brief on this.

19 Let me start with Due Process, since that's where
20 plaintiff started. Plaintiffs have conceded their procedural
21 Due Process claim. We noted that in our Reply Brief. And they
22 have not addressed that here. So clearly those claims need to
23 be dismissed.

24 Regarding substantive Due Process, plaintiffs fail to come
25 to grips with the standard for substantive Due Process. It is

1 not enough to simply show that there is a liberty or property
2 interest at stake, although there is no such liberty or
3 property interest at stake here. Plaintiffs must show that the
4 shocks the conscience.

5 And so I would start where I left off previously, which is
6 President Obama's statement about the nature of DACA, which was
7 that it was a temporary fix. That's all it was. So when
8 plaintiffs come up here and then they say that individual DACA
9 recipients have relied upon their DACA status, and that it
10 would be bad for their DACA status to be taken away from them,
11 that is inconsistent with the statements that were made at the
12 creation of the program.

13 Indeed, as the Court has noted Secretary Napolitano, when
14 she created the DACA program through -- or DACA policy for the
15 DACA memo explicitly noted that this memorandum confers no
16 substantive right, immigration status, or pathway to
17 citizenship. So the documents that created the policy and the
18 statements that were made surrounding the policy undercut any
19 notion that there was a Due Process, liberty, or property
20 interest at stake. And plaintiffs can point to none in the
21 context of this specific case.

22 But even if they could show --

23 Oh, before I get to that, plaintiffs also alluded to
24 information that DACA recipients have provided to USCIS. And
25 again, USCIS has been consistent that its information-sharing

1 policy, while it has not changed -- and there are actually new
2 Frequently Asked Questions that demonstrate that it has not
3 changed; and I can provide those to the Court now, if it wishes
4 to put that issue to rest. But it does retain its discretion
5 to change that policy in the future, and it has always been
6 clear about that.

7 Indeed, USCIS I-821D, which is the form that is used by
8 DACA provide individuals to request DACA status, and which is
9 signed under penalty of perjury by the individual requester,
10 explicitly notes that information-sharing policies may be
11 modified, superseded, or rescinded at any time, without notice,
12 and is not intended to, does not, and may not be relied upon to
13 create any right or benefit.

14 So clearly there is no liberty or property interest at
15 stake here, either regarding the DACA policy generally, or
16 regarding information sharing; but even if there were,
17 plaintiffs failed to address how this is conscience shocking.

18 And I would direct the Court to the *County of Sacramento*
19 *versus Lewis* case. It's a Supreme Court case from 1998. 523
20 US 833. And in that decision on page 849, conscience-shocking
21 behavior, you know, that creates a substantive Due Process
22 right is described as behavior that -- or conduct that is
23 intended to injure in some way, unjustifiable by any government
24 interest, at all.

25 I mean, that is -- that is what plaintiffs need to -- to

1 show or need to allege at this stage in order to state a
2 substantive Due Process claim. And in light of the nature of
3 the policy generally, in light of all of the other issues that
4 we've discussed, candidly, we don't think that they've made
5 that showing; but perhaps most telling is the fact that they
6 have not addressed binding Ninth Circuit precedent that's
7 directly on point on that issue.

8 And if there's any one case that this Court reads
9 regarding substantive Due Process, it's this one; it's the
10 *Munoz versus Ashcroft* case, which was cited in our briefs it's
11 at 339 F. 3d. 950. And it involved an individual who was a
12 Guatemalan citizen who was brought to the United States at one
13 years old. And at approximately the age of 24 he was deported.
14 And he brought a substantive Due Process claim, alleging that
15 his substantive Due Process rights were being violated.

16 He was an individual, like many of the DACA recipients
17 here, who was brought to this country as a child, and who, in
18 all material respects, matched the types of plaintiffs that are
19 bringing the claims in these lawsuits.

20 And in that case the Ninth Circuit stated that the
21 substantive Due Process argument fails, because in the
22 immigration context courts have long recognized the power to
23 expel or exclude aliens as a fundamental sovereign attribute
24 exercised by the government's political departments, largely
25 immune from judicial control. And then they have a long series

1 of citations. And then at the end, the Court concludes that
2 notwithstanding the individual plaintiff's unique
3 circumstances, he has no substantive Due Process right to stay
4 in the United States.

5 At bottom, that is what plaintiffs' complaints are about.
6 It's about substantive Due Process right to stay in the
7 United States; but especially in the immigration context, there
8 are no such rights. And plaintiffs don't meaningfully address
9 this Ninth Circuit precedent.

10 Regarding Equal Protection, we have provided the Court
11 with immigration cases. And instead, plaintiffs have provided
12 this Court primarily with zoning cases. We don't think that
13 these zoning case are applicable here, because of the unique
14 context in which the Equal Protection Clause applies -- or
15 really, in many respects, does not apply -- in the immigration
16 context.

17 One set of cases the Court should read is the *Armstrong*
18 case, which we've cited repeatedly; but in particular I want to
19 point the Court's attention to *Reno versus AADC*, which is the
20 Supreme Court case at 525 US 4771. This is an immigration
21 case. And in that case, toward the conclusion of its opinion
22 on page 491 -- I will direct the Court to that general text of
23 the case. It notes the incredibly broad authority that the
24 Executive has in the immigration context, including, for
25 example, that the Executive can make decisions in the

1 immigration context about who to deport based on, you know,
2 selective treatment, which is essentially the issue that was
3 being litigated in that case.

4 If the Executive has such broad authority in the
5 immigration context, you know, plaintiffs have to be able to
6 demonstrate -- and they cannot demonstrate, and certainly have
7 not alleged -- that they can meet the standard of showing not
8 only disparate --

9 **THE COURT:** What did the Supreme Court say about
10 Equal Protection in that case?

11 **MR. ROSENBERG:** So in that case, I don't know if the
12 words "Equal Protection" appear literally in the AADC, but it
13 relied on the *Armstrong* case, which was a selective-prosecution
14 case in the Equal Protection context. And *Armstrong* did do an
15 Equal Protection analysis.

16 And under *Armstrong* -- this is where the cases are
17 similar.

18 **THE COURT:** Tell me about *Armstrong*.

19 **MR. ROSENBERG:** So in *Armstrong* -- that was a
20 selective-prosecution case. It involved criminal discovery.
21 And the individual plaintiffs, who were the criminal
22 defendants, alleged that they were being selectively prosecuted
23 based on their race. And, you know, they were all African
24 Americans. And they argued that of all of the cases that had
25 been closed, I believe, by the local District Attorney or

1 U.S. Attorney -- I think it was a U.S. Attorney's Office.
2 During the past year, all 24 cases involved African Americans.

3 **THE COURT:** That was in our District.

4 **MR. ROSENBERG:** I think it -- I know it came out of
5 the Ninth Circuit. I think it might have been Central District
6 of California.

7 **THE COURT:** All right. We had that very problem in
8 this District. And -- but I don't remember. It goes to the
9 Court of Appeals. Our District dismissed all of those cases.

10 **MR. ROSENBERG:** It went to the Supreme Court. And
11 this is a case -- I mean, I can save the Court some time. You
12 can review our briefs on this. But the Court said that
13 obviously disparate impact is not enough, especially in the
14 context of prosecution, where there is a special province of
15 the Executive, and you shouldn't be second-guessing decisions
16 about the discretion that a prosecutor is exercising in
17 enforcing the laws. You have to overcome a very high standard.

18 And then in *AADC*, the Supreme Court applies *Armstrong* in
19 the context of deferred action and the 1252(g) statute and, you
20 know, discusses the issues that my colleague had addressed
21 regarding, you know, justiciability; but it also, toward the
22 end of the decision, around page 491, does address the
23 substance of the claim. And the Court says the Executive
24 should not have to disclose its real reasons for deeming
25 naturals of a particular country a special threat.

1 (Reporter requests clarification.)

2 **MR. ROSENBERG:** -- for deeming nationals of a
3 particular country a special threat, or, indeed, for wishing to
4 antagonize a particular foreign country by focusing on that
5 country's nationals. And even if it did disclose them to a
6 court, it would be ill equipped to determine their
7 authenticity, and utterly unable to assess their adequacy.

8 And ultimately the Court notes that, you know, in these
9 cases, and in deportation context generally, if anything, the
10 Equal Protection-type arguments are weaker than in a criminal
11 prosecution case, because deportation is not a criminal
12 punishment for anyone. It's simply a form of relief that
13 removes somebody who is unlawfully in the United States from
14 the United States. And as long as they're in the
15 United States, it's a continuing violation.

16 So certainly at the President has the ability and the
17 Government has the ability, as this Court has noted, to provide
18 references based on nationality, and to --

19 **THE COURT:** Well, but you didn't cite the decision
20 for me. I thought there was such a decision, but nobody seems
21 to know what I'm talking about.

22 **MR. ROSENBERG:** I don't have the case handy. My
23 understanding is that identifying individuals on the basis of
24 nationality, such as whether somebody, for example, is Mexican,
25 is okay; but identifying or discriminating on the basis of

1 national origin -- for example, whether somebody is Hispanic or
2 the example, you know, Asian -- is not okay.

3 **THE COURT:** So let's say that the Administration
4 decided to deport everyone who was Hispanic. And you would
5 agree that would be a violation of Equal Protection?

6 **MR. ROSENBERG:** If I identified -- I don't know if it
7 would be -- using the colloquial language that I've used, that
8 would not be consistent with governing case law. Certainly,
9 based on national origin, you know, that could be an Equal
10 Protection violation; but nationality, which is, you know,
11 whether somebody's from a particular country, is, of course,
12 fine, because, you know, we have historically made distinctions
13 based on nationality.

14 But here, going back to the issue at hand, if you look at
15 the *Armstrong* case and you look at the *AADC* case, it makes
16 clear the Executive has incredibly broad discretion in the
17 context of the execution of the immigration laws.

18 **THE COURT:** You've got about five more minutes to
19 address irreparable injury, if you want to do that.

20 **MR. ROSENBERG:** Yeah. Let me go ahead and do that,
21 Your Honor, and the scope of relief, although we don't think
22 any relief is appropriate.

23 So we're here on a Preliminary Injunction Motion. We need
24 to be crystal clear about this. We do not think that
25 plaintiffs are likely to succeed on the merits, and haven't met

1 any of the other factors; but they certainly have not met a
2 showing for irreparable injury, at least, at this point. You
3 know. It's December 20th, as we discussed previously.

4 **THE COURT:** They look lose their work permits. Isn't
5 that injury, right there?

6 **MR. ROSENBERG:** Well, whether an individual loses a
7 work permit might be an injury, but that's not going to happen
8 until March 5th.

9 **THE COURT:** Okay. That's pretty soon.

10 **MR. ROSENBERG:** That's two months away. And so the
11 question is whether --

12 **THE COURT:** What are they supposed to do? Wait until
13 March 4th?

14 **MR. ROSENBERG:** Before we get to that, though, we
15 also need to address whether or not any preliminary relief that
16 this Court might consider providing. And again, we don't think
17 any preliminary relief is appropriate, at all; but to the
18 extent the Court is contemplating relief, would that solve the
19 injuries of which plaintiffs complain?

20 And if you look at their Complaints and you look at the
21 declarations that they've submitted, it is based largely on
22 either anxiety, or plaintiffs' inability to make long-term
23 plans, such as enrolling in college, buying a house, getting
24 married. I think plaintiffs have discussed some of these very
25 issues in the last few minutes.

1 Preliminary injunctive relief that will last only through
2 the end of this lawsuit will not do anything to solve the harms
3 of which plaintiffs complain. This Court's entering of a PI
4 will not cause somebody to go out and buy a house, because this
5 Court's PI will only last, at most, for a couple of months. It
6 may ultimately be reversed on the merits by this Court, if the
7 Court ultimately issues a decision on the merits. If the
8 Government were to appeal, it may be stayed or reversed by a
9 Court of Appeals. And so none of the temporary relief that
10 plaintiffs are seeking here actually addresses the primary
11 injuries of which plaintiffs complain.

12 And so for that reason, we don't think that plaintiffs
13 have made a showing of irreparable injury that's sufficient to
14 carry their burden on a preliminary injunction. And for that
15 reason, alone, that would be a basis to deny the preliminary
16 injunction; but even if they were to make such a showing, we
17 think -- the Government thinks that it is premature for this
18 Court to contemplate a preliminary injunction at this point in
19 time, because the effect of the rescission won't happen until
20 March 5th.

21 **THE COURT:** Wait. While we're on that subject -- it
22 has a little to do with it -- what is the schedule in the
23 Supreme Court on the mandamus petition?

24 **MR. ROSENBERG:** I believe that it -- I do not know.
25 It's on the Supreme Court's calendar. And I wouldn't want to

1 hazard a guess as to what the Supreme Court's current schedule
2 is.

3 **THE COURT:** Has it been fully briefed?

4 **MR. ROSENBERG:** Yeah. Mandamus has been fully
5 briefed.

6 **THE COURT:** So you're waiting for --

7 Well, would they normally argue mandamus, or is that
8 something submitted on the briefs?

9 **MR. ROSENBERG:** It's a somewhat unique circumstance,
10 Your Honor. I don't know that we are anticipating an oral
11 argument, although it could be possible.

12 The petition is also written in the alternative as a
13 Petition for Writ of Certiorari. And so, you know, that may
14 raise the possibility of an argument. The Court has not
15 indicated to us, certainly, that it wants to hear argument.

16 **THE COURT:** All right. All of the briefs are in?

17 **MR. ROSENBERG:** All of the briefs are in.

18 I do also want to address the scope of relief, because
19 that does go to the issue of irreparable injury. If you look
20 at plaintiffs' Proposed Order, they have requested that this
21 Court enter an order that would essentially reinstate the
22 entire DACA policy.

23 Under no circumstances should this Court issue such an
24 order. That is far broader than any injury of which plaintiffs
25 complain. And, indeed, that has the possibility of "scrambling

1 the egg," so to speak, that plaintiffs were complaining about
2 earlier, because if this Court on a temporary basis were to
3 order the Government to reinstate the entire policy as it
4 existed prior to September 5th, even though plaintiffs cannot
5 show any injury for any of the clients that they represent;
6 individuals who would have applied for DACA after
7 September 5th -- so in that sense, it's too broad.

8 But beyond that issue, because of the temporary nature of
9 the order, the Government cannot predict and cannot make any
10 assurances as to how those applications would be treated if the
11 Government would obtain ultimate relief on the merits, either
12 from this Court, or from some sort of subsequent appeal.

13 **THE COURT:** All right. All right. I've got to bring
14 it to a close. I'll give you just two minutes on your side to
15 respond. You did have -- you had more time than the
16 Government, so -- but I'll give you two minutes now. Go ahead.

17 **MR. DAVIDSON:** On irreparable harm, two things.

18 The Government's position is that, essentially, because
19 preliminary relief would not cure every problem that's been
20 asserted in that case, that you can't cure any of the problems.
21 That's not right.

22 Second, we have shown that between now and March, there
23 are going to be irreparable harms that accrue. Just for
24 example, we've shown that there are people who are planning to
25 travel overseas on advanced parole in January, who won't be

1 able to do so because of the rescission.

2 We've shown that there are people who are dropping out of
3 degree programs right now, because they don't think that
4 they're going to have work permits in March. That's happening
5 right now. And those harms will accrue between now and March.

6 We have students who can't match to medical residencies.
7 That process is going to happen in mid February and mid March.

8 And so all of that is an ample showing that the status quo
9 ought to be preserved between now and final judgment.

10 **THE COURT:** In the hierarchy of benefits, I see these
11 benefits.

12 One. Work permit.

13 Two. Discretionary deferral.

14 Three. The overseas parole.

15 And then I guess four doesn't count for -- what is it?
16 Unlawful presence? Is that the right phrase?

17 **MR. DAVIDSON:** Correct.

18 **THE COURT:** Unlawful presence.

19 So seems like those are the four benefits.

20 But is the parole thing really as important as the work
21 permit, when we're talking about balancing equities, and so
22 forth?

23 **MR. DAVIDSON:** Well, we're here asking for
24 provisional relief that will protect us between now and final
25 judgment. So certainly travel --

1 **THE COURT:** I've got to take into account a lot of
2 the -- I'm going to do a careful balancing of equities, even if
3 we give provisional relief. And a blanket, across-the-board
4 you win everything is possible; but I also have to consider the
5 possibility that I do some fine calibration. So I'm asking
6 you: Would you rather have the work permits, or would you
7 rather have parole to go home for vacation?

8 **MR. DAVIDSON:** I don't think we'd like to be put to
9 that choice, Your Honor, because it --

10 **THE COURT:** Oh, no. You're not helping me.

11 **MR. DAVIDSON:** The equities are --

12 **THE COURT:** All right. Okay. Let me go to the --
13 Did you want to say something about the Due Process?

14 **MR. ROSENBAUM:** I do, Your Honor. I'll -- I'll --

15 **THE COURT:** Because you've used up a lot of time, so
16 I'll give you one minute to respond.

17 **MR. ROSENBAUM:** I'll just make two points,
18 Your Honor.

19 With respect to the standard that Counsel said with
20 respect to liberty, I don't know of any case in the history of
21 the Republic that says that an individual must show both an in
22 impairment of liberty interests, as well as a shock to
23 conscience. They're two separate Due Process arguments.

24 I refer the Court specifically to the *Morrissey* case at
25 482, where the description of the liberty for a parolee

1 actually tracks, almost verbatim, what we're talking about.

2 **THE COURT:** Read it to me.

3 **MR. ROSENBAUM:** Sure. (Reading.) *The liberty of a*
4 *parolee enables him to do a wide range of things open to*
5 *persons who have never been convicted of any crime, subject to*
6 *the conditions parole. He can be gainfully employed; is free*
7 *to be with his family and friends, to form other enduring*
8 *attachments of a normal life.*

9 We're not asking for citizenship. We're not asking for
10 legal status. We're asking for the capacity -- the
11 opportunity -- to maintain what was a reasonable expectation in
12 the pursuit of those matters.

13 Secondly, with respect to the use of the *Munoz* case, the
14 *Zadvydas* case specifically says that aliens enjoy liberty
15 interest. There's a legion of cases that say that. *Munoz* was
16 an individual who lived 24 years in this country without any
17 legal status, whatsoever. Zero. He crossed the country
18 illegally as a two-year-old, and just stayed here. Of course,
19 he did not accrue any liberty interest as result of any
20 federal- or state-created right, itself.

21 The back of that opinion which Counsel referred to refers
22 to suspension of deportation cases. Same point there,
23 Your Honor. Nobody has an entitlement -- a specific
24 entitlement, a reasonable entitlement -- to suspension.

25 In our case, the Government specifically sets out the *quid*

1 *pro quo* and says individuals can be gainfully employed, can
2 seek education, can otherwise involve in productive, normal
3 lives. *Munoz* actually supports our case because, by contrast,
4 we have precisely those sorts of entitlements and those sorts
5 of interests.

6 **THE COURT:** All right. Thank you.

7 Did you want to respond on Equal Protection for one
8 minute?

9 **MR. DETTMER:** Thank you, Your Honor. I appreciate
10 your indulgence.

11 So just really quickly, the *AADC* case, the *Armstrong*
12 case -- those are both selective-prosecution cases for an
13 individual. What we're doing here, as Your Honor knows, is
14 challenging, on a whole host of grounds, including Equal
15 Protection, the rescission of a policy; a policy that affects
16 hundreds of thousands of people, and on which hundreds of
17 thousands of people relied.

18 And I'll just finish by saying that reliance involved much
19 more than just anxiety at the rescission of this policy. And,
20 you know, there are clients of mine in this room who would --
21 and I'm sure did -- just recoil at that word. This goes far
22 beyond anxiety. It's a life-changing blow of --

23 **THE COURT:** If you have clients here, why don't you
24 introduce them to the Court? I didn't realize you had any
25 here.

1 **MR. DETTMER:** I apologize, Your Honor. Dulce Garcia
2 is here --

3 **THE COURT:** Welcome to the court. Thank you for
4 coming.

5 **MR. DETTMER:** -- as is Jirayut Latthivongskorn, who
6 is also here.

7 **THE COURT:** Again, welcome to the court. Thank you
8 for coming.

9 **MR. DETTMER:** I appreciate you welcoming them,
10 Your Honor. And, you know, they were welcomed by the country
11 in a way when DACA was put into place that, if you read their
12 Declarations that were submitted in connection with this
13 motion, is hard for people like you and me, who are born here
14 to, understand. And it's a change in their relationship to
15 this country that is hard for us to --

16 **THE COURT:** Listen. I agree with that. It's hard to
17 understand that.

18 For 18 and a half years on the criminal side, I've had
19 over a hundred cases that involved this fact pattern in various
20 many different scenarios, so I have been exposed to this
21 problem. It's not like I'm not -- I don't understand it. It's
22 something you don't practice, but I see it every week in the
23 criminal calendar, so I do have some appreciation for it.

24 **MR. DETTMER:** And I would suggest nothing to the
25 contrary, Your Honor.

1 And I would say -- and I have not had a chance to consult
2 with my co-counsel on the question you asked at the end about
3 your calibration of the injunction, should you enter it.

4 I guess what I would say for my clients is that the two
5 things that are most important, should you make that
6 evaluation, were the work permit, as you mentioned, and the
7 protection from removal. I mean, those are really the core
8 issues.

9 **THE COURT:** Seems to me that those are the biggest
10 items.

11 **MR. ROSENBERG:** Thirty seconds, just to respond.

12 **THE COURT:** Well, no. All right. Go ahead. Thirty
13 seconds.

14 **MR. ROSENBERG:** I'm done here. We fully appreciate
15 the situation that the DACA recipients find themselves in. And
16 I want to be absolutely clear about that with the Court and
17 with the recipients who are in this courtroom.

18 Unfortunately, the DACA policy that plaintiffs have
19 described today and in their filings is inconsistent with the
20 policy that actually existed. And if the Court looks at the
21 documents that created and described that policy, you know,
22 which it should do, the legal conclusions, I think, are clear
23 there.

24 **THE COURT:** All right. You did do that in 30
25 seconds. All right.

1 I want to thank both sides for your massive briefs.
2 They're massive because we've got a lot of issues. And I'm not
3 criticizing you for the length of the briefs in this case. I
4 think you both tried hard. Both sides are trying very hard.

5 I don't have as many lawyers on the case as you do. And
6 it will take me some time to get this done, but I'm going to
7 start. I have been working on it, so don't -- it's not like I
8 haven't been, but I'm going to continue working on it. I can't
9 give you a prediction for when this will be -- an Order will
10 come out.

11 Earlier, you had suggested at that maybe you'd want to
12 submit something. I don't want you to submit anything more.
13 Unless you could think of something that is burning in your
14 memory that you've just got to fix, I would prefer that this be
15 under submission now.

16 **MR. ROSENBERG:** That's fine with us, Your Honor.

17 **MR. DETTMER:** Submitted.

18 **THE COURT:** All right. Done. It will be submitted
19 on the Record that I have now. And if I do decide I need more
20 input, I will ask you; but right now I'm going to possibly just
21 decide it on the Record we have.

22 I thank everyone out there who came. And anybody who is a
23 party or directly involved in this, thank you very much for
24 coming. And we sometimes get issues of grave importance here
25 in the courtroom, and this has been one of them. So thank you

1 for attending. All right. We're in recess.

2 (At 12:15 p.m. the proceedings were adjourned.)

3 I certify that the foregoing is a correct transcript from the
4 record of proceedings in the above-entitled matter.

5

6 *Lydia Zinn*

7 Signature of Court Reporter/Transcriber Date
8 Lydia Zinn December 21, 2017

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